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THE
LAW OF WILLS

AN INTRODUCTION TO THE RULES OF LAW EQUITY AND CONSTRUCTION RELATING TO TESTAMENTARY DISPOSITIONS

BY

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GENERAL EDITOR'S INTRODUCTION

Of the content of Equity Maitland has said: "It is a collection of appendixes between which there is no very close connexion. If we suppose all our law put into systematic order, we shall find that some chapters of it have been copiously glossed by equity, while others are quite free from equitable glosses." Accordingly, as Maitland himself points out, important parts of Equity are now best understood by studying them in conjunction with that part of the Common Law to which they naturally appertain. For example, no one to-day discusses the Common Law of fraud in relation to contract without turning to the equitable doctrines on the subject. Yet when all due allowance has been made for branches of the law wherein equitable rules may be studied as appendices to Common Law rules, there remain important fields of English law wherein Equity remains supreme, and into which the common lawyer even to-day, more than half a century after the Judicature Acts, ventures haltingly and reluctantly. How necessary is a true appreciation of modern equitable principles at once to student and practitioner, readers of Mr. Hanbury's stimulating essay upon "The Field of Modern Equity" will admit; and it may perhaps be suggested that the necessity of keeping distinct legal and equitable principles is more important to-day than it was before 1873, inasmuch as the Common Law approach to a problem is quite different from that of Equity, and in an age when all practitioners apply, and all civil courts administer, both Law and Equity, this distinctive mode of approach is in some danger of being minimised. The present series of textbooks has been designed, therefore, with the object of treating within moderate compass those branches of English law where equitable doctrines are of very considerable importance, and where some understanding of equitable principles in general seems essential. Individual authors have, however, written rather with the object of showing how those equitable principles have permeated that branch of the law which they have selected for discussion, than with the object of discussing the relevant equitable principles alone. They have written, in fact, with the conviction that whilst there is no fusion between Law and Equity, there is nevertheless harmony. It is not claimed that the series will eventually embrace every equitable rule. It will, however, include the main topics wherein equitable influence has been considerable, and it will also include one volume which is devoted simply to a consideration of a number of those general equitable principles which are of importance primarily in the sphere of property. The series is framed with the belief that there is a need for reliable textbooks of moderate size, dealing with these topics, which necessarily receive somewhat brief treatment in a single volume covering the whole field of Equity.

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PREFACE

This book is intended primarily as an introductory survey of the English Law of Wills for the use of law students. With this end in view I have endeavoured to present a description, not merely of those aspects of the subject which are usually epitomized by standard textbooks on the Law of Property, but also of those general principles of Equity which are of particular importance in the law of wills, and of the main principles by which the Courts are guided when the construction or interpretation of a will is in issue. In a textbook of this size it is, of course, impossible to deal in detail with all the various problems which wills may raise—though a student who has access to the Law Reports and to the relevant Statutes (which are collected and explained in Hayes and Jarman's excellent work on this subject) will find plenty of opportunity to follow such matters further. I have, therefore, attempted no more than to introduce the reader to the major aspects of the subject, in the hope that this method of approach will leave him suitably equipped to consult those celebrated treatises, such as Jarman on Wills, Theobald on Wills, Hawkins on Wills, and Williams on Executors, on which practitioners rely.

For the benefit of those readers who feel themselves to be insufficiently acquainted with the modern law of property to attack the law of wills without some preliminary assistance, I have endeavoured to approach the subject without assuming previous knowledge, and have attempted, in the introductory chapter, to sketch some of the fundamental conceptions of the Law of Property as it stands to-day. Although the more technical refinements of the Law of Wills admittedly require a far deeper study of general property law than this introductory sketch attempts to provide, I am hopeful that it may serve at once to emphasize or recall these essential conceptions to the minds of those who have already studied them, and to supply a helpful background for those readers who have no previous knowledge of the Law of Property.

I am indebted to Professor D. Hughes Parry, M.A., LL.M., of the London School of Economics, who has been good enough to read the whole of this book in manuscript, and to make many valuable criticisms and suggestions. I am indebted also to Dr. Keeton, the General Editor of this Series, who read both manuscript and proof, and from whom I obtained further helpful advice. I desire to record my gratitude for their kindnesses.

S. J. B.

CAMBRIDGE
December, 1934

CONTENTS

PAGE
GENERAL EDITOR'S INTRODUCTION v
PREFACE vii
TABLE OF STATUTES xiii
TABLE OF CASES xvii

CHAPTER I

INTRODUCTION 1
A. WILLS DISTINGUISHED FROM OTHER DISPOSITIONS OF PROPERTY 1
B. PERSONAL REPRESENTATIVES 5
C. SKETCH OF MODERN LAW OF PROPERTY . . 9

CHAPTER II

SKETCH OF HISTORICAL DEVELOPMENT . . . 15
A. WILLS 15
B. PERSONAL REPRESENTATIVES 20
C. PROBATE 22
D. INTESTACY RULES 24

CHAPTER III

THE EXECUTION OF WILLS 30
A. WHAT LAW APPLIES 30
B. THE FORMALITIES NECESSARY WHEN ENGLISH LAW APPLIES 33

CHAPTER IV

THE NATURE OF A WILL 42

CHAPTER V

THE LIMITS OF THE POWER OF TESTATION . . 51
A. WHAT PROPERTY CAN BE DEVISED OR BEQUEATHED 51
B. CAPACITY TO MAKE A WILL 54
C. WHO MAY BENEFIT UNDER A WILL . . . 56

CHAPTER VI

REVOCATION AND REVIVAL 65

CHAPTER VII

PAGE
LEGACIES AND DEVISES 72
A. ADEMPTION AND ABATEMENT 72
B. THE POWERS AND DUTIES OF PERSONAL REPRESENTATIVES 76
C. SUCCESSIVE INTERESTS IN THE SAME PROPERTY . 81
D. DOUBLE LEGACIES 90
E. DISCLAIMER 91

CHAPTER VIII

EQUITABLE DOCTRINES 93
A. CONVERSION 93
B. SECRET TRUSTS 100
C. ELECTION 102
D. SATISFACTION 104

CHAPTER IX

CONDITIONS 107

CHAPTER X

RULES AGAINST REMOTENESS 116
A. RULE AGAINST ABEYANCE OF THE SEISIN . . 116
B. RULE IN WHITBY *v.* MITCHELL 117
C. RULE AGAINST INALIENABILITY 119
D. RULE AGAINST PERPETUITIES 121
E. DIRECTIONS TO ACCUMULATE INCOME . . 134

CHAPTER XI

CONSTRUCTION: I. GENERAL PRINCIPLES . . . 137
A. INTRODUCTORY 137
B. GENERAL PRINCIPLES OF CONSTRUCTION . . 139
C. EXTRINSIC EVIDENCE 146
D. SUBSIDIARY PRINCIPLES OF CONSTRUCTION . . 151

CHAPTER XII

CONSTRUCTION (*contd.*): II. DESCRIPTIONS OF PERSONS 158
A. INDIVIDUALS 158
B. CLASS GIFTS 163
C. OTHER RULES OF CONSTRUCTION APPLICABLE TO GIFTS TO INDIVIDUALS AND TO CLASS GIFTS . 166

CHAPTER XIII

PAGE
CONSTRUCTION (*contd.*): III. DESCRIPTIONS OF PROPERTY 170
A. WHAT PROPERTY IS COMPRISED IN A GIFT BY WILL 170
B. WHAT ESTATE OR INTEREST IN THE PROPERTY IS OBTAINED BY A LEGATEE OR DEVISEE . . 180
INDEX 195

TABLE OF STATUTES

		PAGE
	(Magna Carta, 1215)	21
13 Edw. I, st. 1	(Westminster II, 1285), c. 19	21
31 Edw. III, st. 1, c. 11	(Administration of Estates, 1357)	21
27 Hen. VIII, c. 10	(Statute of Uses, 1535)	18
32 Hen. VIII, c. 1	(Statute of Wills, 1540)	18, 19, 22
12 Car. II, c. 24	(Statute of Tenures, 1660)	19
22 & 23 Car. II, c. 10	(Statute of Distribution, 1670)	21, 24
29 Car. II, c. 3	(Statute of Frauds, 1677)	17, 19, 38
1 Jac. II, c. 17	(Statute of Distribution, 1685)	24
39 & 40 Geo. III, c. 98	(Accumulations Act, 1800)	134
11 Geo. IV & 1 Will. IV, c. 40	(Executors Act, 1830)	59
3 & 4 Will. IV, c. 74	(Fines and Recoveries Act, 1833)	14
	s. 15	53
3 & 4 Will. IV, c. 106	(Inheritance Act, 1833)	26, 27
	s. 2	26
7 Will. IV & 1 Vict., c. 26	(Wills Act, 1837)	17, 19 100, 101
	s. 1	44
	s. 3	51
	s. 7	34, 55
	s. 9	35, 36, 37, 38, 39
	s. 10	175
	s. 11	33, 34, 55
	s. 14	38
	s. 15	38, 58, 66
	s. 16	58
	s. 17	58
	s. 18	68, 69
	s. 19	68
	s. 20	41, 65, 67
	s. 21	40, 41
	s. 22	70
	s. 24	20, 146, 170, 176, 177
	s. 25	146, 173
	s. 26	75, 146, 178
	s. 27	75, 146, 175, 176, 177
	s. 28	63, 146, 185, 186
	s. 29	146, 184, 185
	ss. 30, 31	185
	s. 32	60, 61, 62
	s. 33	61, 62, 63, 177
8 & 9 Vict., c. 106	(Real Property Act, 1845)	
	s. 3	1
15 & 16 Vict., c. 24	(Wills Act Amendment Act, 1852)	36, 37
17 & 18 Vict., c. 113	(Real Estate Charges Act, 1854)	76
20 & 21 Vict., c. 77	(Court of Probate Act, 1857)	23
	s. 23	20
22 & 23 Vict., c. 35	(Lord St. Leonard's Act, 1859)	
	s. 19	26
24 & 25 Vict., c. 114	(Wills Act, 1861)	30
	s. 1	31, 32
	s. 2	31, 32
	s. 3	31, 33
	s. 4	32
30 & 31 Vict., c. 69	(Real Estate Charges Act, 1867)	76

		PAGE
33 & 34 Vict., c. 35	(Apportionment Act, 1870)	81, 82
36 & 37 Vict., c. 66	(Judicature Act, 1873)	20, 23, 85
40 & 41 Vict., c. 33	(Contingent Remainders Act, 1877)	117
c. 34	(Real Estate Charges Act, 1877)	76
41 & 42 Vict., c. 31	(Bills of Sale Act, 1878)	11
44 & 45 Vict., c. 41	(Conveyancing Act, 1881)	142
45 & 46 Vict., c. 39	(Conveyancing Act, 1882)	
	s. 10	185
c. 43	(Bills of Sale Act, 1882)	11
c. 75	(Married Women's Property Act, 1882)	54
52 & 53 Vict., c. 63	(Interpretation Act, 1889)	
	s. 1	143
53 & 54 Vict., c. 5	(Lunacy Act, 1890)	
	s. 123	76
c. 29	(Intestates' Estates Act, 1890)	25, 27, 145
55 & 56 Vict., c. 58	(Accumulations Act, 1892)	134
56 & 57 Vict., c. 63	(Married Women's Property Act, 1893)	
	s. 3	54
60 & 61 Vict., c. 65	(Land Transfer Act, 1897)	6, 7, 10, 22, 23
	ss. 1–3	117
4 & 5 Geo. V, c. 59	(Bankruptcy Act, 1914)	
	s. 42	2
7 & 8 Geo. V, c. 58	(Wills (Soldiers and Sailors) Act, 1918)	19, 33, 35
	s. 1	34, 55
	s. 2	34
	s. 3	34, 55
	s. 4	34, 44
	s. 5	34
15 Geo. V, c. 18	(Settled Land Act, 1925)	81
	s. 4	2
	s. 36	112
15 Geo. V, c. 19	(Trustee Act, 1925)	
	ss. 1–11	85, 87
	s. 18	52, 171
	s. 26	77
	s. 27	78
	s. 31	78, 80, 109, 135
	s. 32	80, 81
	s. 33	52
	s. 36	81
	s. 41	81
15 Geo. V, c. 20	(Law of Property Act, 1925)	
	s. 1	13, 55, 117, 187
	s. 28	77, 86, 88, 89
	s. 34	52, 97
	s. 35	110
	s. 36	97, 98, 187
	s. 51	1
	s. 60	142, 186
	s. 73	36
	s. 121	134
	s. 130	14, 27, 33, 46, 53, 61, 119, 142, 181, 182, 184, 188, 189, 190, 191
	s. 131	142, 188
	s. 132	143, 188
	s. 134	185
	s. 161	118, 128
	s. 162	134
	s. 163	122, 123, 124, 127, 156
	ss. 164–6	134, 135
	s. 168	91
	s. 171	56

		PAGE
15 Geo. V, c. 20	(Law of Property Act, 1925) (*cont.*)	
	s. 172	2
	s. 175	75, 79, 109, 183
	s. 176	19, 44, 53, 54, 55, 62, 75, 77, 172, 180
	s. 177	68, 69
	s. 178	51
	s. 179	46
	s. 180	54
	s. 184	63
	s. 205	86
	First Schedule, Part IV	97, 110
15 Geo. V, c. 23	(Administration of Estates Act, 1925)	22, 23, 24, 69, 144
	s. 1	7, 27, 44, 54, 62, 171
	s. 2	7, 171
	s. 3	7, 27, 44, 54, 62
	s. 5	7
	s. 6	7
	s. 7	6
	s. 22	52
	s. 26	5
	s. 27	9
	s. 32	5, 54, 62, 77, 78, 179
	s. 33	27, 92, 97
	s. 34	6, 10, 75, 77, 179
	s. 35	76, 172
	s. 36	24, 44, 77, 78
	s. 37	9
	s. 38	78
	s. 39	77
	s. 41	77
	s. 44	78
	s. 45	10, 13, 27, 69
	s. 46	5, 10, 11, 13, 18, 27, 145
	s. 47	5, 10, 27, 28, 106
	s. 48	27
	s. 49	28, 59
	s. 50	25, 26, 69, 145, 146
	s. 51	27, 55
	s. 52	69
	s. 55	11, 28, 74, 77
	First Schedule	6, 10, 73, 74, 75, 76
15 & 16 Geo. V, c. 45	(Guardianship of Infants Act, 1925)	
	s. 5	44
15 & 16 Geo. V, c. 49	(Supreme Court of Judicature (Consolidation) Act, 1925)	23
	s. 150	7
	s. 159	7
	s. 160	6, 8, 44
	s. 162	8, 52
	s. 166	8
16 & 17 Geo. V, c. 11	(Law of Property (Amendment) Act, 1926), Schedule	97
17 & 18 Geo. V, c. 41	(Superannuation and other Trust Funds (Validation) Act, 1927)	134
18 & 19 Geo. V, c. 26	(Administration of Justice Act, 1928)	
	s. 9	6, 8
24 & 25 Geo. V, c. 41	(Law Reform (Miscellaneous Provisions) Act, 1934)	
	s. 1	6
	c. 53 (County Courts Act, 1934), s. 60	7

TABLE OF CASES

PAGE
Abbot, *Re*, [1893] 1 Ch. 54 . . . 132
Abrahams, *Re*, [1911] 1 Ch. 108 . . . 79
Acherley *v.* Vernon (1725), 10 Mod. 518 . . . 172
Ackerley, *Re*, [1913] 1 Ch. 510 . . . 53
Ackroyd *v.* Smithson (1780), 1 Bro. C.C. 503 . . . 98, 99
Adams, *Re* (1872), 2 P. & D. 367 . . . 40
Airey *v.* Bower (1887), 12 A.C. 263 . . . 177
Allen *v.* Jackson (1876), 1 Ch.D. 399 . . . 114
Allhusen *v.* Whittell (1867), L.R. 4 Eq. 295 . . . 84
Allott, *Re*, [1924] 2 Ch. 498 . . . 129
Andrew *v.* Trinity Hall (1804), 9 Ves. 525 . . . 91
Appleton, *Re* (1885), 29 Ch.D. 893 . . . 59
Arthur, *Re* (1871), 2 P. & D. 273 . . . 37
Ashburner *v.* Maguire (1786), 2 Bro. Ch. 108 . . . 74
Atkinson, *Re*, [1930] 1 Ch. 47 . . . 75

Backhouse, *Re*, [1921] 2 Ch. 51 . . . 132
————, *Re*, [1931] W.N. 168 . . . 91
Baker, *Re*, [1924] 2 Ch. 271 . . . 89
——, *Re*, [1929] 1 Ch. 668 . . . 70
——, *Re*, [1934] W.N. 19, 94 . . . 177
Bancroft, *Re*, [1928] 1 Ch. 577 . . . 170
Bartholomew *v.* Henley (1820), 3 Phillim. 317 . . . 43
Bathe, *Re*, [1925] Ch. 377 . . . 115
Bathurst *v.* Errington (1877), 2 A.C. 698 . . . 162
Beard, *Re*, [1908] 1 Ch. 383 . . . 110, 112
Beavan *v.* Beavan (1869), 24 Ch.D. 649 . . . 90
Beech, *Re*, [1923] P. 46 . . . 66
Bellairs *v.* Bellairs (1874), L.R. 18 Eq. 510 . . . 115
Bennett, *Re*, [1934] W.N. 177; 78 S.J. 876 . . . 2
Bentley, *Re*, [1914] W.N. 88; 110 L.T. 623 . . . 61
Birks, *Re*, [1900] 1 Ch. 417 . . . 163
Birt, *Re* (1871), 2 P. & D. 214 . . . 40
Blackwell, *Re*, [1929] A.C. 318 . . . 101
Blake *v.* Blake (1882), 7 P.D. 102 . . . 38
Blight *v.* Hartnoll (1881), 19 Ch.D. 294 . . . 186
Bloxam *v.* Favre (1884), 9 P.D. 130 . . . 33
Booth, *Re*, [1926] P. 118 . . . 35
Borwick, *Re*, [1933] 1 Ch. 657 . . . 111
Bouch *v.* Sproule (1887), 12 A.C. 385 . . . 82
Boughton *v.* James (1844), 1 Col. 26; (1848) 1 H.L.C. 406 . . . 119
Boulter, *Re*, [1922] 1 Ch. 75 . . . 111
Bowker, *Re*, [1932] P. 93 . . . 50
Bowles, *Re*, [1902] 2 Ch. 650 . . . 118
Bowman, *Re* (1889), 41 Ch.D. 525 . . . 140, 166, 167
Boyes, *Re* (1884), 26 Ch.D. 531 . . . 46, 101
Braddock, *Re* (1876), 1 P.D. 433 . . . 39
Bradley *v.* Peixoto (1797), 3 Ves. 324 . . . 113
Brandon *v.* Robinson (1811), 18 Ves. 429 . . . 113, 114
Bridgett and Hayes, *Re*, [1928] Ch. 163 . . . 52
Brooker, *Re*, [1926] W.N. 93 . . . 86
Brooks, *Re*, [1928] Ch. (C.A.) 214 . . . 143
Brown *v.* Gellatly (1867), L.R. 2 Ch. App. 751 . . . 87, 88
Bubb *v.* Yelverton (1871), 13 Eq. 131 . . . 59
Bulcock, *Re*, [1916] 2 Ch. 495 . . . 144
Bullock, *Re*, [1915] 1 Ch. 493 . . . 128

PAGE
Burnham, *Re*, [1918] 2 Ch. 196 . . . 163
Burrough *v.* Philcox (1840), 5 My. & Cr. 73 . . . 168
Butler *v.* Butler (1884), 28 Ch.D. 66 . . . 178
Byron's Settlement, *Re*, [1891] 3 Ch. 474 . . . 175
Bywater, *Re* (1881), 18 Ch.D. 17 . . . 154

Cadell *v.* Palmer (1833), 1 Cl. & F. (H.L.) 372) . . . 121 122 123
Cadogan, *Re* (1884), 25 Ch.D. 154 . . . 179
Careless *v.* Careless (1816), 1 Mer. 384 . . . 151
Carrington, *Re*, [1932] 1 Ch. 1 . . . 95
Cattell, *Re*, [1914] 1 Ch. 177 . . . 135
Cawthron, *Re* (1863), 3 Sw. & Tr. 417 . . . 47
Chancey's Case (1717), 1 P.Wms. 408 . . . 104
Chardon, *Re*, [1928] Ch. 464 . . . 57 120
Charter *v.* Charter (1874), 7 H.L. 364 . . . 140 147 158
Chaytor, *Re*, [1905] 1 Ch. 233 . . . 86
Cheese *v.* Lovejoy (1877), 2 P. & D. 251 . . . 67
Chesham (Lord), *Re* (1886), 31 Ch.D. 466 . . . 102, 103
Chesterfield's Trusts, *Re* (1883), 24 Ch.D. 643 . . . 89, 90
Christian *v.* Devereux (1841), 12 Sim. 264 . . . 59
Church *v.* Mundy (1808), 12 Ves. 426; 15 Ves. 396 . . . 172
Cleaver *v.* Spurling (1729), 2 P.Wms. 526 . . . 114
Clout and Frewer, *Re*, [1924] 2 Ch. 230 . . . 91
Cockerill, *Re*, [1929] 2 Ch. 131 . . . 113
Codrington *v.* Codrington (1875), L.R. 7 H.L. 854 . . . 102, 103
Coley, *Re*, [1903] 2 Ch. 102 . . . 162
Collings, *Re*, [1920] 1 Ch. 92 . . . 179
Collins *v.* Elstone, [1893] P. 1 . . . 56
Combe, *Re*, [1925] Ch. 210 . . . 168
Commissioners of Income Tax *v.* Pemsel, [1891] A.C. 531 . . . 57
Coombs, *Re* (1866), 1 P. & D. 302 . . . 37
Cossentine, *Re*, [1933] 1 Ch. 119 . . . 192, 193
Crippen, *Re*, [1911] P. 108 . . . 57
Cripps *v.* Wolcott (1819), 4 Madd. 11 . . . 166
Crosse, *Re*, [1933] W.N. 36 . . . 167
Cruse, *Re*, [1930] W.N. 206 . . . 147
Crumpe *v.* Crumpe, [1900] A.C. 127 . . . 181
Curteis *v.* Wormald (1878), 10 Ch.D. 172 . . . 99

Da Costa, *Re*, [1912] 1 Ch. 337 . . . 112
Da Silva, *Re* (1861), 2 Sw. & Tr. 315 . . . 47
Dadds, *Re* (1857), Dea. & Sw. 290 . . . 67
Dale, *Re*, [1931] 1 Ch. 357 . . . 193
Daniels, *Re*, (1918), 87 L.J.Ch. 661 . . . 161
Darley *v.* Langworthy (1774), 3 Bro. P.C. 359 . . . 110
Darlington *v.* Pulteney (1775), 1 Cowp. 260 . . . 47
Davies, *Re*, [1928] 1 Ch. 24 . . . 67, 173
Dawes' Trusts, *Re* (1876), 4 Ch.D. 210 . . . 126
Dawkins *v.* Penrhyn (Lord) (1878), 4 A.C. 51 . . . 113
Dean, *Re* (1889), 41 Ch.D. 552 . . . 57, 120
Deloitte, *Re*, [1919] 1 Ch. 209 (C.A.) . . . 126, 127
——, *Re*, [1926] 1 Ch. 56 . . . 129, 135, 173
Denby, *Re* (1861), 3 De. G.F. & J. 350 . . . 59
De Sommery, *Re*, [1912] 2 Ch. 622 . . . 129
Devisme *v.* Mello (1781), 1 Bro. C.C. 537 . . . 126
Dickens, *Re* (1934), 78 S.J. 898 [1935] W.N. 3. . . . 182
Dimes *v.* Scott (1827), 4 Russ. 195 . . . 86
Dimond *v.* Bostock (1875), 10 Ch. 358 . . . 165
Dixon *v.* Solicitor to the Treasury, [1905] P. 42 . . . 71
Doe d. Gord *v.* Needs (1836), 2 M. & W. 129 . . . 148, 149, 160
—— d. Hiscocks *v.* Hiscocks (1839), 5 M. & W. 363 . . . 160, 161
Doherty-Waterhouse, *Re*, [1918] 2 Ch. 269 . . . 176

PAGE
Drew, *Re*, [1899] 1 Ch. 336 162
Duddell, *Re*, [1932] 1 Ch. 585 . . . . 47, 48
Duffield *v.* Elwes (1827), 1 Bligh N.S. 497 3
Dufour *v.* Pereira (1769), 1 Dickens 419 . . . . . 48, 49
Dugdale, *Re* (1888), 38 Ch.D. 176 113
Dunster, *Re*, [1909] 1 Ch. 103 174
Durrant *v.* Friend (1852), 5 De G. & Sm. 343 75

Eastwood *v.* Vinke (1731), 2 P.Wms. 614 105
Eccles *v.* Cheyne (1856), 2 K. & J. 676 61
Egerton *v.* Brownlow (1853), 4 H.L.C. 1 110
Elliott *v.* Davenport (1705), 1 P.Wms. 83 66
Emerson, *Re* (1882), 9 L.R.Ir. 443 36
———, *Re*, [1929] 1 Ch. 128 . . . . 179, 180
Evans, *Re* (1887), 34 Ch.D. 597 77
———, *Re*, [1909] 1 Ch. 784 170
Evans' Contract, *Re* [1920] 2 Ch. 469 . . . . . 107, 114

Faux, *Re* (1915), 84 L.J.Ch. 873; W.N. 135 127
Fegan, *Re*, [1928] Ch. 45 76
Ffinch *v.* Combe, [1894] P. 191 41
Fish, *Re*, [1894] 2 Ch. 83 . . . . 147, 163
Fitzpatrick, *Re* (1934), 78 S.J. 735 153
Fletcher, *Re* (1888), 38 Ch.D. 373 104
Flower, *Re* (1885), 55 L.J.Ch. 200 131
Forder, *Re*, [1927] 2 Ch. 291 113
Forrest, *Re*, [1931] 1 Ch. 162 174
Foster *v.* Elsley (1881), 19 Ch.D. 518 44
Frost, *Re* (1889), 43 Ch.D. 246 128
Fuller's Contract, *Re*, [1933] Ch. 652 . . . . . . 52, 98
Fulton *v.* Andrew (1875), L.R. 7 H.L. 448 . . . . . 56, 59

Gage, *Re*, [1934] 1 Ch. 536 . . . . 72, 73
Garrett, *Re*, [1934] 1 Ch. 477 80
Garrick *v.* Camden (Lord) (1807), 14 Ves. 372 145
Garvey *v.* Hibbert (1812), 19 Ves. 125 169
Gates, *Re*, [1929] 2 Ch. 420 179
Gattward *v.* Knee, [1902] P. 99 34
Gaze *v.* Gaze (1843), 3 Curt. 451 38
Gibson *v.* Bott (1802), 7 Ves. 89 . . . . 86, 87
Gilmour *v.* MacPhillamy, [1930] A.C. 712 . . . . 140, 166, 167
Glover, *Re* (1847), 11 Jur. 1022 36
Goodtitle d. Bailey *v.* Pugh (1787), 3 Bro. P.C. 454 142
Gowenlock, *Re* (1934), 177 L.T. News 95 159
Grassi, *Re*, [1905] 1 Ch. 584 32
Gray *v.* Perpetual Trustee Co., Ltd., [1928] A.C. 391 49
Greenstreet, *Re* (1930), 74 S.J. 188 71
Groos, *Re*, [1904] P. 269 31
Gwyon, *Re*, [1930] 1 Ch. 255 120

Hagger, *Re*, [1930] 2 Ch. 190 . . . . 48, 49
Hale, *Re*, [1915] 2 Ir.R. 362 34
Hall, *Re*, [1914] P. 1 57
——, *Re*, [1932] 1 Ch. 262 162
Halston, *Re*, [1912] 1 Ch. 435 . . . . 152, 160
Hammond, *Re*, [1924] 2 Ch. 276 189
Hancock *v.* Watson, [1902] A.C. 14 156
Hanlon, *Re*, [1933] 1 Ch. 254 . . . . 113, 115
Harding, *Re*, [1934] 1 Ch. 271 76
Hardyman, *Re*, [1925] 1 Ch. 287 162
Harper, *Re*, [1914] 1 Ch. 70 192
Harris, *Re*, [1909] 2 Ch. 206 103

	PAGE
Hawksley's Settlement, *Re*, [1934] 1 Ch. 384	46, 66, 137
Hayden, *Re*, [1931] 2 Ch. 333	189
Hearle *v.* Hicks (1832), 1 Cl. & Fin. 20	67, 155
Heath, *Re*, [1892] P. 253	40
Helliwell, *Re*, [1916] 2 Ch. 580	141
Hensler, *Re* (1881), 19 Ch.D. 612	63
Hewett, *Re*, [1918] 1 Ch. 458	111
Hewson *v.* Shelley, [1914] 2 Ch. 13	9
Heys, *Re*, [1914] P. 192	48
Heywood, *Re*, [1916] P. 47	50
Hind, *Re*, [1933] 1 Ch. 208	112
Hobbs, *Re*, [1917] 1 Ch. 569	118
Hodgson *v.* Jex (1876), 2 Ch.D. 122	153
Hodson *v.* Barnes (1926), 43 T.L.R. 71	35
Holroyd *v.* Marshall (1862), 10 H.L.C. 191	4
Horsford, *Re* (1874), 3 P. & D. 211	39
Holt, *Re*, [1921] 2 Ch. 17	178
Holyland *v.* Lewin (1884), 26 Ch.D. 266	61
Hotchkys, *Re* (1886), 32 Ch.D. 408	91
Houghton, *Re*, [1915] 2 Ch. 173	57
Howe *v.* Lord Dartmouth (1802), 7 Ves. 137	87, 88, 89, 92
Huish, *Re* (1889), 43 Ch.D. 260	104
Humberston *v.* Humberston (1716), 1 P. Wms. 332	118
Hume, *Re*, [1912] 1 Ch. 693	122
Hurst *v.* Beach (1821), 5 Mad. 351	91
Inderwick *v.* Tatchell, [1903] A.C. 120	166
Inman, *Re*, [1915] 1 Ch. 187	86
Jackson, *Re* (1883), 25 Ch.D. 162	165
———, *Re*, [1933] 1 Ch. 237	150, 162, 163
Jeaffreson, *Re* (1866), 2 Eq. 276	143
Jee *v.* Audley (1787), 1 Cox. 324	129
Jenkins, *Re*, [1931] 2 Ch. 218	76
Jenner *v.* Turner (1880), 16 Ch.D. 188	114
Jessop, *Re*, [1924] P. 221	40
Joicey, *Re*, [1933] 1 Ch. 778	123
Jones, *Re*, [1910] 1 Ch. 167	189
———, *Re*, [1932] 1 Ch. 642	79
———, *Re*, [1934] 1 Ch. 315	46, 182
——— *v.* Jones (1876), 1 Q.B.D. 279	111
Keigwin *v.* Keigwin (1843), 3 Curt. 607	38
Kempthorne, *Re*, [1930] 1 Ch. 268	97
King *v.* Cleaveland (1858), 26 Bea. 26; (1859), 4 De G. & J. 477	144
Kingsbury *v.* Walter, [1901] A.C. 187	164, 165
Kirby *v.* Potter (1799), 4 Ves. 748	74
Knapp, [1929] 1 Ch. 341	136
Ladd, *Re*, [1932] 2 Ch. 219	60
Lanyon, *Re*, [1927] 2 Ch. 264	111
Lassence *v.* Tierney (1849), 1 Mac. & G. 551	155, 156, 157
Lawes *v.* Bennett (1785), 1 Cox. 167	95, 96
Lawrence, *Re*, *Times Newspaper*, 4th Nov., 1932	68
Leeming, *Re*, [1912] 1 Ch. 828	75
L'Herminier, *Re*, [1894] 1 Ch. 675	182
Leonard *v.* Leonard, [1902] P. 243	39
Leventhorpe *v.* Ashbie (1634), 1 Roll. Abr. 831 pl. 1	119, 191
Lewis, *Re*, [1904] 2 Ch. 656	112
——— *v.* Lewis, [1908] P. 1	39
Lightfoot *v.* Maybery, [1914] A.C. 782	142
Limond, *Re*, [1915] 2 Ch. 240	58

PAGE
Lord *v.* Lord (1867), 2 Ch. App. 782 . . . 78
Lovell, *Re*, [1920] 1 Ch. 122 . . . 111
Lowe *v.* Davies (1729), 2 Ld. Raym. 1561 . . . 142
Lucena *v.* Lucena (1877), 7 Ch.D. 255 . . . 167
Lyne's Trusts, *Re*, [1919] 1 Ch. 80 . . . 32

Maber, *Re*, [1928] Ch. 88 . . . 135
McCabe, *Re* (1873), 3 P. & D. 94 . . . 71
Macdonald *v.* Irvine (1878), 8 Ch.D. 101 . . . 88
McEuen, *Re*, [1913] 2 Ch. 704 . . . 84
McKee *v.* Archbold, [1933] N.I. 47 . . . 109
Macleay, *Re* (1875), 20 Eq. 186 . . . 113
Marcus, *Re* (1887), 57 L.T. 399 . . . 58
Marlay, *Re*, [1915] 2 Ch. 264 . . . 96
Marshall, *Re*, [1928] Ch. 661 . . . 156
Mason *v.* Ogden, [1903] A.C. 1 . . . 173
Maxwell, *Re* (1929), 140 L.T. 471 . . . 50
Mayo, *Re*, [1901] 1 Ch. 404 . . . 169
Mears, *Re*, [1914] 1 Ch. 694 . . . 166
Mellish, *Re*, [1929] 2 K.B. 82 . . . 98
Mellor, *Re*, [1929] 1 Ch. 446 . . . 180
Meredith, *Re*, [1924] 2 Ch. 552 . . . 61, 62
—— *v.* Treffry (1879), 12 Ch.D. 170 . . . 162
Mervin, *Re*, [1891] 3 Ch. 197 . . . 127
Meyer *v.* Simonsen (1852), 5 De. G. & S. 723 . . . 86, 87
Miller, *Re* (1889), 61 L.T. 365 . . . 153
Monypenny *v.* Dering (1852), 2 De G.M. & G. 145 . . . 119, 132
Moore, *Re* (1888), 39 Ch.D. 116 . . . 111
——, *Re*, [1901] 1 Ch. 936 . . . 113, 124
Morgan, *Re* (1866), 1 P. & D. 214 . . . 42
——, *Re*, [1893] 3 Ch. 222 . . . 186
——, *Re*, [1920] 1 Ch. 196 . . . 25, 145
Mortimer, *Re*, [1905] 2 Ch. 502 . . . 119
Mucklow *v.* Fuller (1821), Jac. 198 . . . 44
Mullins *v.* Smith (1860), 1 Dr. & Sm. 204 . . . 74
Murphy *v.* Deichler, [1909] A.C. 446 . . . 33

Nash, *Re*, [1910] 1 Ch. 1 . . . 103, 117, 118
Newman, *Re*, [1930] 2 Ch. 409 . . . 98
Nichols *v.* Nichols (1814), 2 Phillim. 180 . . . 42
Nightingale, *Re* (1927), 64 L.J. 34; 71 S.J. 542 . . . 63

Ofner, *Re*, [1909] 1 Ch. 60 . . . 159
Oldham, *Re*, [1925] 1 Ch. 75 . . . 48, 49
Oliver, *Re*, [1908] 2 Ch. 74 . . . 86

Palmer, *Re*, [1893] 3 Ch. 369 . . . 174
Patten, *Re*, [1929] 2 Ch. 276 . . . 120
Paul, *Re*, [1920] 1 Ch. 99 . . . 126, 127
——, *Re*, [1921] 2 Ch. 1 . . . 69, 130, 131
—— *v.* Compton (1803), 8 Ves. 375 . . . 168
Payne, *Re*, [1927] 2 Ch. 1 . . . 155
Pearce, *Re*, [1909] 1 Ch. 819 . . . 79
Pearson, *Re*, [1920] 1 Ch. 247 . . . 62
Pepin *v.* Bruyère, [1902] 1 Ch. 24 . . . 30
Peppin *v.* Bickford (1797), 3 Ves. 570 . . . 162
Petty, *Re*, [1929] 1 Ch. 726 . . . 75
Phipps *v.* Hale (1874), 3 P. & D. 166 . . . 39
Piazzi Smith, *Re*, [1898] P. 7 . . . 48
Picken *v.* Mathews (1878), 10 Ch.D. 264 . . . 127
Pilot *v.* Gainfort, [1931] P. 103 . . . 69
Pitcairn, *Re*, [1890] 2 Ch. 199 . . . 88

PAGE
Pitts, *Re*, [1931] 1 Ch. 546 . . . 57
Pooley, *Re* (1888), 40 Ch.D. 1 . . . 58
Portal and Lamb, *Re* (1885), 30 Ch.D. 50 . . . 170
Powell, *Re* (1869), 39 L.J.Ch. 188 . . . 131
———, *Re*, [1898] 1 Ch. 227 . . . 125
——— *v.* Hellicar, [1919] 1 Ch. 138 . . . 167
Prevost, *Re*, [1930] 2 Ch. 383 . . . 120
Price, *Re*, [1932] 2 Ch. 54 . . . 147, 152
Prosser, *Re*, [1929] W.N. 85 . . . 193
Putner, *Re* (1929), 45 T.L.R. 325 . . . 179
Pyle, *Re*, [1895] 1 Ch. 724 . . . 95
Pym *v.* Lockyer (1840), 5 My. & Cr. 29 . . . 105

Raine, Re, [1929] 1 Ch. 716 . . . 80, 81
Randfield *v.* Randfield (1863), 32 L.J.Ch. 668 . . . 58
Rattenberry, *Re*, [1906] 1 Ch. 667 . . . 104
Ray, *Re*, [1916] 1 Ch. 461 . . . 152
Reade, *Re*, [1902] P. 75 . . . 70
——— Revell, *Re*, [1930] 1 Ch. 52 . . . 80
Reeves, *Re*, [1928] Ch. 351 . . . 171
Reich, *Re* (1924), 40 T.L.R. 398 . . . 113
Richardson *v.* Watson (1833), 4 B. & Ad. 787 . . . 148
Richerson, *Re*, [1892] 1 Ch. 379 . . . 99
Ridge, *Re* (1933), 149 L.T. 266 . . . 162
Roberts, *Re*, [1934] P. 102 . . . 37
——— *v.* Edwards (1863), 33 Beav. 259 . . . 142
Robinson, *Re*, [1930] 2 Ch. 332 . . . 66
——— *v.* Ommanney (1883), 23 Ch.D. 285 . . . 48
Robson, *Re*, [1916] 1 Ch. 116 . . . 117
Rogers *v.* Mutch (1878), 10 Ch.D. 25 . . . 125
——— *v.* Thomas (1837), 2 Keen. 8 . . . 179
Rooke, *Re*, [1933] Ch. 970 . . . 79
Rose *v.* Bartlett (1631), Cro. Car. 292 . . . 178
—— and Frank Co. *v.* Crompton, Ltd., [1923] 2 K.B. 261 . . . 154
Rosher, *Re* (1884), 26 Ch.D. 801 . . . 113
Rous *v.* Jackson (1875), 29 Ch.D. 521 . . . 131
Routledge *v.* Dorril (1794), 2 Ves. Jun. 357 . . . 119

Sandbrook, *Re*, [1912] 2 Ch. 471 . . . 111, 113
Saunders *v.* Vautier (1841), 4 Beav. 115 . . . 136
Scalé *v.* Rawlins, [1892] A.C. 342 . . . 139
Scott, *Re*, [1901] 1 K.B. 228 . . . 62
——, *Re*, [1903] 1 Ch. 1 . . . 105
Seabrook, *Re*, [1911] 1 Ch. 151 . . . 176
Sharman, *Re* (1869), 1 P. & D. 661 . . . 58
Sharp, *Re*, [1908] 2 Ch. 190 . . . 169
——— *v.* Lush (1879), 10 Ch. D. 468 . . . 79
Shaw, *Re*, [1929] W.N. 246 . . . 180
Shearn, *Re* (1880), 50 L.J.P. 15 . . . 40
Shee, *Re*, [1934] 1 Ch. 345 . . . 84
Shelley's Case (1581), 1 Co. Rep. 93b . . . 188
Sibley *v.* Cook (1747), 3 Atk. 572 . . . 60
——— *v.* Perry (1802), 7 Ves. 522 . . . 188
Sigsworth, *Re*, [1934] W.N. 187 . . . 57
Sikes, *Re*, [1927] 1 Ch. 364 . . . 171
Slater, *Re*, [1907] 1 Ch. 665 . . . 75
Sleeman, *Re*, [1929] W.N. 16 . . . 181
Slinn, *Re* (1890), 15 P.D. 156 . . . 42
Smalley, *Re*, [1929] 2 Ch. 112 . . . 140, 147, 163
Smart, *Re*, [1902] P. 238 . . . 46
Smee *v.* Bryer (1848), 1 Rob. Ecc. 616 . . . 36
Smith, *Re* (1889), 15 P.D. 2 . . . 58

PAGE
Smith, *Re*, [1916] 1 Ch. 369 . . . 113
———, *Re*, [1931] P. 225 . . . 37
———, *Re*, [1933] 1 Ch. 847 . . . 142
——— *v.* Harris (1845), 1 Rob. 262 . . . 36
——— *v.* Smith (1866), 1 P. & D. 143 . . . 38
Southerden, *Re*, [1925] P. 177 . . . 71
Speir, *Re*, [1924] 1 Ch. 359 . . . 83
Spencer, *Re*, [1934] W.N. 209 . . . 80
Spooner's Trusts, *Re* (1851), 2 Sim. N.S. 129 . . . 173, 176
Spratt, *Re*, [1897] P. 28 . . . 47
Springett *v.* Jenings (1871), 6 Ch. 333 . . . 173
Springfield, *Re*, [1894] 3 Ch. 603 . . . 183
Stalman, *Re*, [1931] W.N. 143; 145 L.T. 339 . . . 37
Stanley (Ada), *Re*, [1916] P. 192 . . . 34
Stevens *v.* King, [1904] 2 Ch. 30 . . . 60
Stocks *v.* Barré (1859), Johns. 54 . . . 179
Stokes, *Re*, [1928] Ch. 716 . . . 78
Stone, *Re*, [1895] 2 Ch. 196 . . . 138
——— *v.* Hoskins, [1905] P. 194 . . . 48
Stoodley, *Re*, [1915] 2 Ch. 295; (1916), 1 Ch. 242 . . . 67
Sturt, *Re*, [1922] 1 Ch. 416 . . . 100
Sturton *v.* Whellock (1883), 48 L.T. 237 . . . 71
Sugden *v.* Lord St. Leonards (1876), 1 P. & D. 154 . . . 68
Sullivan, *Re*, [1930] 1 Ch. 84 . . . 91, 92
Sutcliffe, *Re*, [1929] 1 Ch. 123 . . . 145
———, *Re*, [1934] 1 Ch. 219 . . . 163, 164, 188
Sutton, *Re*, [1934] 1 Ch. 209 . . . 145
Sykes, *Re* (1873), 3 P. & D. 26 . . . 40
Synge *v.* Synge, [1894] 1 Q.B. 466 . . . 48

Talbot *v.* Shrewsbury (1714), Prec. Ch. 394 . . . 104
Taylor, *Re*, [1931] 2 Ch. 242 . . . 55
Thellusson *v.* Woodford (1799), 4 Ves. 227; (1805), 11 Ves. 112 120, 124, 134
Thomas's Will Trusts, *Re*, [1930] 2 Ch. 67 . . . 110
Thompson, *Re*, [1906] 2 Ch. 199 . . . 130
——— *v.* Browne (1835), 3 My. & K. 32 . . . 43
Thorn *v.* Dickens, [1906] W.N. 54 . . . 140, 147
Thorpe *v.* Bestwick (1881), 6 Q.B.D. 311 . . . 58
Townsend *v.* Ashcroft, [1917] 2 Ch. 14 . . . 186
Trollope, *Re*, [1927] 1 Ch. 596 . . . 88
Trotter, *Re*, [1899] 1 Ch. 764 . . . 58
Turner *v.* Martin (1857), 7 D.M. & G. 429 . . . 60
Turton, *Re*, [1926] 1 Ch. 96 . . . 110
Tyler, *Re*, [1891] 3 Ch. 252 . . . 57, 133

University College of N. Wales *v.* Taylor, [1908] P. 140 . . . 46
Usborne, *Re* (1909), 25 T.L.R. 519 . . . 37

Vanderplank *v.* King (1843), 3 Hare 1 . . . 118
Van Grutten *v.* Foxwell, [1897] A.C. 658 . . . 142
Vardon's Trusts, *Re* (1885), 31 Ch.D. 275 . . . 103
Velasco *v.* Coney, [1934] P. 143 . . . 33, 67
Venn, *Re*, [1904] 2 Ch. 52 . . . 165
Villar, *Re*, [1929] 1 Ch. 243 . . . 124
Viner *v.* Francis (1789), 2 Cox. 190 . . . 61
Vines *v.* Vines, [1910] P. 14 . . . 47

Wagstaff, *Re*, [1908] 1 Ch. 162 . . . 140
Walbran, *Re*, [1906] 1 Ch. 64 . . . 193
Walker, *Re* (1912), 28 T.L.R. 466 . . . 56
——— *v.* Walker (1860), 2 D.F. & J. 255 . . . 110

PAGE
Wallace, *Re*, [1920] 2 Ch. 274 110
Walpole, *Re*, [1933] 1 Ch. 431 . . . . 99, 135
Ward *v*. Van der Loeff, [1924] A.C. 653 . . . . . . 128, 173
Wareham, *Re*, [1912] 2 Ch. 312 88
Wedmore, *Re*, [1907] 2 Ch. 277 72
Weeds *v*. Bristow (1866), 2 Eq. 333 166
Wentworth *v*. Wentworth, [1900] A.C. 163 86
Weston's Settlement, *Re*, [1906] 2 Ch. 620 177
Wharton *v*. Masterman, [1895] A.C. 186 136
Whiston, *Re*, [1924] 1 Ch. 122 169
White, *Re*, [1914] P. 153 50
Whitehead, *Re*, [1920] 1 Ch. 298 143
Whiting's Settlement, *Re*, [1905] 1 Ch. 96 . . . . . 114, 115
Whitby *v*. Mitchell (1890), 44 Ch.D. 85 . . . . 117, 118, 119, 128
Whorwood, *Re* (1887), 34 Ch.D. 446 . . . . . . 161, 162
Whyte *v*. Pollok (1882), 7 App. Cas. 400 43
Wilday *v*. Barnett (1868), 6 Eq. 193 176
Wild's Case (1599), 6 Rep. 16b 190, 191
Wilkinson, *Re*, [1869] 4 Ch. 587 176
Williams, *Re*, [1912] 1 Ch. 399 111
———, *Re*, [1933] 1 Ch. 244 101
Wills, *Re*, [1915] 1 Ch. 769 84
Wimperis, *Re*, [1914] 1 Ch. 502 92
Wing *v*. Angrave (1860), 8 H.L.C. 183 63
Winn, *Re*, [1910] 1 Ch. 278 144
Wise *v*. Whitburn, [1924] 1 Ch. 460 44
Wolfe *v*. Wolfe, [1902] 2 Ir. 246 42
Woods, *Re*, [1931] 2 Ch. 138 174
Woodward *v*. Goulstone (1886), 11 A.C. 469 68
Wright *v*. Lambert (1877), 6 Ch.D. 649 90
——— *v*. Wakeford (1811), 17 Ves. 454 36
Wynch *v*. Wynch (1788), 1 Coz. 433 78

Yates, *Re*, [1919] P. 93 . . . . 34, 35

LAW OF WILLS

CHAPTER I

INTRODUCTION

A. WILLS DISTINGUISHED FROM OTHER DISPOSITIONS OF PROPERTY

A PERSON who desires to make a gift of his property, whether he intends the gift to operate at once or to await his death, must observe the appropriate legal requirements; and the law will disregard his wishes, however clear they may be, if he fails to do so. The requirements which the law demands will depend upon the nature of the benefactions he desires to make.

Gifts inter vivos

Gifts *inter vivos.*

In the first place it is conceivable that he may wish to make an *immediate* gift of his property, or of some of it, to the object of his bounty. This is known as a "gift *inter vivos*," for it is to operate during his lifetime. In early times some form of *delivery* was usually required by law for such a gift; but at the present day gifts of *land* are required by law to be made by a formal written document, called a *deed*, and can no longer be made by delivery.[1] Thus delivery is now effective only on the transfer of *chattels*—such as money, furniture, cattle, and the like. Even chattels, however, may be transferred by deed, if the donor prefers to use this method instead of delivery;[2] for a deed is now capable of transferring practically any kind of property.

(a) Immediate.

An absolute and immediate gift *inter vivos* has some advantages even from the standpoint of the donor; for, unlike benefactions contained in a will, it may escape the claims of his creditors,[1] and if made at least three years before he dies it is not liable to death duties. There is, however, an obvious disadvantage in such absolute gifts from a donor's point of view; for immediately the gift is made he loses all his rights in the property concerned, including any income which the property is producing.

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[1] In early times freehold land was conveyed by "feoffment with livery of seisin"—a form of delivery. This method of conveyancing was abolished by the Law of Property Act, 1925, s. 51. But it was already practically obsolete; for, by the Real Property Act, 1845, s. 3, a simple deed was sufficient, and a feoffment, if used, was void at law unless evidenced by deed—apart from the exceptional case of a feoffment made by an infant under the custom of Gavelkind.

[2] Transfer by delivery is usually preferable, when possible, since the transfer then escapes liability for stamp duty.

(*b*) Postponed.

In order to avoid this difficulty, and at the same time make an effective and binding gift, property is often transferred in such a way as to allow the donor to retain a temporary interest in it until he dies. In such a case he is said to retain a *life interest* in the subject-matter of the gift.[2] This result is usually achieved by vesting the property in one or more *trustees*, who are directed to hold it upon trust for the donor during the period of his life and after his death upon trust for the specified objects of his bounty. In this way the donor ensures that the trustees who hold the property will pay to him any annual income or profits which arise from it during his lifetime, so he is not impoverished by making the gift; and meanwhile those who are to get the property when he dies have already a potential interest in it. In fact, although this is somewhat difficult to appreciate, they have already an *actual* interest in it. Admittedly it is only a future interest, for they cannot claim any of the income from it until he is dead; yet it is important to realize that this method gives them a definite interest in the property immediately; and, in fact, they can sell or mortgage this future interest at once if they choose to do so, and so may obtain some benefit from it even before the donor dies. An arrangement of this kind is usually called a *settlement* of property, and in general it must be incorporated in a deed in order to comply with the form required by law.[3]

The two types of gift described above have this at least in common: both are gifts *inter vivos.* That is to say, in each case the gift is made and takes effect during the donor's life-time. Indeed, in each case the gift takes effect at once; for, although one variety gives only a future interest which will not produce any income until the donor dies, the fact remains that it gives this interest, such as it is, immediately. Even if the terms of the gift empower the donor to revoke it, should he so desire, the principle is precisely the same. That the interest thus created is a *revocable* interest does not alter the fact that, such as it is, it comes into force at once.

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[1] His creditors may be able to attack the property, however, if the gift was made with intent to defraud them (Law of Property Act, 1925, s. 172), or if he is made bankrupt within 10 years (Bankruptcy Act, 1914, s. 42). See Keeton, *Law of Trusts*, pp. 107–112.

[2] For an alternative method, by which the donor merely *covenants* that, when he dies, his executors will transfer property to the donee, see *Re Bennett*, [1934] W.N. 177; 78 S.J. 876 (C.A.).

[3] If it is a settlement of *land* there must be *two* deeds (Settled Land Act, 1925, s. 4): one declaring *inter alia* that the property is vested in a trustee —who is in this case the donor himself—and the other declaring the trusts upon which he holds the land. But this is not essential if the trust directs the trustee(s) *to sell* the land, i.e. if the land is settled upon trust for sale.

(c) Power of revocation reserved to donor.

Donationes mortis causa

Donationes mortis causa.

At this point it is necessary to mention a somewhat peculiar kind of gift which, though on the face of it a gift *inter vivos*, resembles in some respects a gift by will. It occurs when a donor, in contemplation of death, *delivers* property to a person on the understanding that the gift is not to become absolute until the donor dies. This type of gift, which is known as a *donatio mortis causa*, may be revoked by the donor at any time before his death, and, like gifts by will, is subject to death duties and is liable for the donor's debts; but, since it takes effect (though conditionally) at the time when the delivery occurs, it is apparently a gift *inter vivos*. Moreover, since it can only be made by *delivery*, it cannot effect a gift of land.[1]

Gifts by Will

Gifts by will.

Let us suppose, however, that a donor desires to retain his property under his own absolute control until the very moment of his death—to continue as absolute owner of it, free to do with it what he will; yet he wishes to ensure that this property, if still his when he dies, will then pass to a certain person whom he desires to benefit. This can be done; but in such a case he must record his wishes in the form prescribed by law for wills and testaments, for here we have a true testamentary disposition. Unlike a gift *inter vivos* it has no effect whatever until the donor dies. It neither limits his rights of ownership nor confers any benefit—however slight—upon the objects of his bounty until the moment of his death.[1]

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[1] See, however, *Duffield* v. *Elwes* (1827), 1 Bligh, N.S. 497 (*d.m.c.* of a mortgage deed). Intangible forms of property, such as debts or shares in a company, are not usually transferable by delivery; for one can neither have nor transfer physical possession of them: see *post*, p. 11, *s.t.* "choses in action." But even in such cases the law sometimes allows a *donatio mortis causa*; for, if the ownership or control of the property depends upon some document of title (e.g. a cheque), delivery of that document may suffice for this purpose. See further Snell's *Equity* (21st edn.), ch. XIX.

(*a*) Form.

The form required by law for these testamentary gifts will be described in a later chapter; usually a written document is necessary, signed by the testator (i.e. by the person whose will it is) and by witnesses to his signature. Each benefaction contained in a will is termed a *bequest* or *legacy*, unless it gives a freehold interest in land, in which case it is known as a *devise.*[2] Similarly, a person to whom a bequest or legacy is bequeathed is usually described as *legatee*, whereas one to whom freehold land is devised is called a *devisee.* But in every case it is of the utmost importance to remember that although a benevolent testator may have made a will in favour of certain legatees and devisees, so long as he lives his rights over his property remain unimpaired and the objects of his bounty have only a mere hope that he will do nothing to deprive them of their anticipated benefits—a hope moreover that he will leave no serious debts outstanding at his death, for his property must be used to satisfy his creditors before anyone can claim to benefit under his will.

(*b*) Terminology.

Intestacy

Intestacy.

If a person dies without having made a will, or (which amounts to the same thing) his attempt to make a will fails because he did not observe the formalities prescribed by law, he is said to die *intestate.* Some persons, moreover, are treated by the law as incapable of making a will—e.g. infants and lunatics;[3] accordingly they are likely to die intestate, unless their incapacity ceases—by coming of age or regaining sanity—before they die, and they take advantage of the fact by making a proper will. Sometimes, again, a person makes a valid will, but fails to include all his property in it; in such a case he is said to die *partially intestate*, for his will has effectively disposed of only a part of his property. To all these cases the law applies certain rules fixed by the Administration of Estates Act, 1925, for the distribution of the undisposed of property among the near relatives of the deceased, and failing such relatives the property passes to the Crown as *bona vacantia*. Indeed, it is probable that these rules approximate so closely to the wishes of the average person, who desires to leave his entire property to his wife (if any) and his nearest relations, that it is often of little importance to them whether he makes a will or not.[1] Even here, however, a will has certain advantages, of which the most important is that it enables the testator to select the "personal representatives" who will administer his estate.

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[1] Since a gift of property by will has no effect until the donor dies, the prospective donee cannot transfer his interest therein—for as yet he has no interest. The most he can do is to contract that if and when he gets it he will transfer it. Nevertheless, an attempted assignment (or transfer) *for value* is construed by equity as a contract to assign, and so is not entirely ineffective. See *Holroyd* v. *Marshall* (1862), 10 H.L.C.191.

[2] Sometimes the word "devise" is used to include testamentary gifts even of *leaseholds*, but apparently its strict meaning is confined to gifts of freeholds.

[3] See *post*, Ch. V, *B*.

B. PERSONAL REPRESENTATIVES

Personal Representatives.

An important characteristic of the devolutions of a person's property on his death, whether he leaves a will or dies intestate, is that the property does not pass to the appropriate beneficiaries at once. In order to ensure the due payment of his debts and the proper distribution of his surplus property among the persons to whom he has devised or bequeathed it, or who are entitled to it by virtue of the intestacy rules already mentioned, the whole of the assets which belonged to the deceased at the date of his death devolve in the first place upon his *personal representatives*.[2] These personal representatives are bound by law to use the assets for the payment of his debts, and for this purpose can sue to recover such of his property as is in the hands of other people (e.g. debts owing to him), and can be sued by people to whom the deceased was indebted.[3] Similarly, if there is a surplus after the deceased's creditors have been paid in full, any person entitled thereto, whether as legatee or devisee or under the intestacy rules, can invoke the court's assistance to enforce his rights against the personal representatives. If it should happen that the deceased's assets are insufficient to cover all his liabilities the personal representatives must observe certain rules specified by the

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[1] For these rules see Administration of Estates Act, 1925, ss. 46–47; and *post*, Ch. II, *D*.

[2] For exceptions see *post*, pp. 6, 51–2.

[3] Administration of Estates Act, 1925, ss. 26, 32.

Administration of Estates Act, 1925,[1] which fix the order in which different classes of debts must be paid; and in case the estate, though ample to discharge all the debts, is not adequate to provide also for all the benefactions included in the testator's will, the Act prescribes a further list which settles which legatees or devisees are to suffer through the insufficiency of assets.[2] In such cases, therefore, the duties of a personal representative are of so technical a character that he will be well advised to seek legal advice at every step in the administration of the deceased's estate.

(i) Executors.

(ii) Administrators.

The term "personal representatives" includes, firstly, *executors*, that is to say persons nominated by a testator in his will to administer his estate,[3] and, secondly, *administrators*, namely, persons appointed by the Court to undertake these duties where there is no executor—e.g. because the will appointed none or because the deceased died intestate. It is frequently inadvisable to have only one personal representative; indeed, as many as four may be appointed to act together;[4] nevertheless, a single executor or administrator is usually competent in law to carry out the necessary duties of administration.[5] The fact that executors and administrators are called "personal representatives" does not mean, however, that they represent the person of the deceased; for the strictly personal rights of any individual, such as rights of action for libel, slander, seduction, or adultery, die with him.[6] Its true meaning is that an executor or administrator takes over the deceased's *personal property*, such as chattels and leasehold interests in land. The term "personal representative" originated in the days when an executor or administrator was concerned with personal property only, and had (*qua* representative) no control over a deceased person's *real property*—i.e. freehold interests in land. But, though still used, the term is in fact a misnomer at the present day; for, since the Land Transfer Act of 1897,[1] all property whether real or personal passes to the personal representative; in fact, therefore, he is now a "real representative" also.[2]

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[1] S. 34 (1) and (2), and 1st Schedule, Part I.

[2] S. 34 (3), and 1st Schedule, Part II.

[3] If one of several executors dies the survivors continue in office alone; if a sole or sole surviving executor dies after proving the will, his executors (if any) take his place. (A.E.A., 1925, s. 7.)

[4] Supreme Court of Judicature (Consolidation) Act, 1925, s. 160.

[5] But see Supreme Court of Judicature (Consolidation) Act, 1925, s. 160 (1), for an exception, and compare s. 162 as amended by the Administration of Justice Act, 1928, s. 9.

[6] See Law Reform (Miscellaneous Provisions) Act, 1934, s. 1, for the general rule that on the death of a person both his rights of action and his liabilities survive, as assets and liabilities of his estate: and for the exceptions.

Probate

Probate.

Probate is a document issued under the seal of the Court, and is the official evidence of an executor's authority. A person, therefore, who has been nominated by a will to act as executor, must obtain a grant of probate before he can take any steps which require formal proof of his authority —e.g. if he wishes to sue for debts due to the deceased, or to sell the deceased's land. It is sometimes said that "an executor derives his title from the will"; for probate does no more than certify the validity of the will and of his appointment, and does not itself appoint him to his office. Nevertheless, although an executor is able to exercise many of his powers (e.g. to pay debts and legacies, and sell the deceased's chattels) without first obtaining probate of the will, it is generally advisable to obtain probate at the earliest possible moment. Indeed, he may be compelled to do so, at the instance of persons interested, if he has already begun to administer the deceased's estate. But in no other case can one compel an executor to "prove" a will, for unless he has begun to act as executor he has a perfect right to refuse to accept office—in other words, he has the right to *renounce*.[3]

(i) Solemn form.

If the validity of a will is contested, probate will not be granted until a court of probate has pronounced in its favour. In such a case the grant of probate is said to be "*in solemn form*." At the present time this jurisdiction is exercised by the Probate, Divorce and Admiralty Division of the High Court of Justice;[4] but it is likely to be assigned shortly to the Chancery Division, which already has jurisdiction to construe the meaning of the words and phrases which a will contains.[5]

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[1] See now Administration of Estates Act, 1925, ss. 1–3.

[2] As regards special personal representatives for the purpose of *settled land*, see *post*, p. 52, n. 2.

[3] See also Judicature Act, 1925, s. 159, and Administration of Estates Act, 1925, ss. 5 and 6, as regards renunciation.

[4] County Courts have jurisdiction in such matters only if the value of the deceased's personal estate is under £200 and that of his real estate is under £300 (Judicature Act, 1925, s. 150; County Courts Act, 1934, s. 60).

[5] This recommendation occurs in the Second Interim Report of the Business of Courts Committee (Dec., 1933; Cmd. 4471, pp. 9 and 13).

(ii) Common form.

In the majority of cases, however, litigation is unnecessary, and the executor is able to obtain a grant of probate by merely applying to the principal probate registry in London, or to one of the many district registries established throughout the country for the purpose. This is known as *probate in common form.*[1] But, naturally, a registrar will not allow a grant of probate to issue unless the document propounded as a will appears to be in order; moreover, many somewhat technical formalities must be observed before such a grant can be obtained, and estate duty must be paid on the estimated value of the estate. The will itself is retained by the authorities, but an official copy of it is annexed to the grant of probate and handed to the executor.

Letters of Administration

Letters of administration.

If the deceased left no will or nominated no executor therein, or if all the executors nominated die before him or refuse to act, an administrator will be appointed to administer the deceased's estate. Grants of administration may be obtained in much the same way as grants of probate, but it is unnecessary for our purposes to describe the appropriate procedure in these cases. Certain rules have been formulated by statute for the guidance of the Court in selecting a person for the office of administrator—usually the person who has the greatest interest in the estate has preference—and in some cases two administrators are necessary.[2] The document issued to an administrator as his authority is known as "*letters of administration*"; and where there is a will but no executor the grant of administration is said to be *cum testamento annexo*,[3] in order to distinguish it from a grant of administration arising through intestacy.

[1] It is sometimes advisable to prove a will in solemn form even when its validity is not contested, for a grant of probate in common form does not prevent interested persons from compelling the executor to prove the will in solemn form; hence if he has doubts as to its validity or suspects that it will be challenged in the future, the executor should obtain proof in solemn form at once. Otherwise his witnesses may be dead when he is eventually called upon to establish the will in Court, and his inability to prove his case will lead to the revocation of the grant in common form which he originally obtained.

[2] Supreme Court of Judicature (Consolidation) Act, 1925, ss. 160–162. Two are required as a rule if a life interest or a minority is involved (but see Administration of Justice Act, 1928, s. 9).

[3] *Ibid.*, s. 166. So also if a sole or sole surviving executor who died after the testator himself left no executor or failed to prove the will.

Revocation of Grant

Revocation of grant.

The Court has power to revoke a grant of probate or of letters of administration if it is subsequently ascertained that the grant was improper—e.g. if a will is discovered of later date than that of which probate has been granted. The revocation of the grant cancels the authority which it gave to the executor or administrator concerned. He must therefore relinquish his office, and do nothing further in the administration of the deceased's estate. But he is protected by statute from liability for any payments or dispositions of the property which he made in good faith before the grant was revoked; and persons who have already made payments in good faith to him cannot be called upon to pay again.[1] Moreover, although any persons who have obtained some part of the assets from a personal representative (e.g. in payment of supposed legacies) must usually return the same if his authority is revoked, this is not so if they purchased the property from him in good faith and for value.[2]

Thus in *Hewson* v. *Shelley*[3] (1914) a man died leaving certain land. No will could be found; hence letters of administration were granted to his wife, it being assumed that he had died intestate. She then sold this land to Shelley by virtue of her powers as administratrix. Some ten years later it was discovered that her husband had in fact left a will appointing Hewson executor. The letters of administration were accordingly revoked, and a grant of probate was made to him. He thereupon sued Shelley for the return of the land; but the Court of Appeal decided in Shelley's favour, for he had bought the land in good faith.

C. SKETCH OF MODERN LAW OF PROPERTY

The law of wills is a branch of the law of property. It is, therefore, essential to appreciate something of the outlines of modern property law before one attempts to grapple with the more advanced problems of the law of wills. In order to obtain a really satisfactory knowledge of the intricacies, or even of the elements, of Property Law, it is necessary to study the standard textbooks on Real and Personal

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[1] Administration of Estates Act, 1925, s. 27.

[2] *Ibid.*, s. 37, enbodying the principle formulated in *Hewson* v. *Shelley*, [1914] 2 Ch. 13.

[3] [1914] 2 Ch. 13 (C.A.).

Property.[1] The following rough sketch of some of the more important points to be borne in mind when approaching the law of wills may be useful, however, by way of introduction to our subject.

Classification of Property

Classification of property. (i) Real and personal.

English law, as we have already seen, divides property into *real* property, which for historical reasons include only freehold interests in land, and *personal* property, which comprises all other proprietary interests whether in land or in chattels. This classification, it will be observed, is not identical with the more obvious distinction which can be drawn between *immoveable property* (i.e. all interests in land) and *moveable property* (i.e. property other than land); for by an historical accident the holder of a lease of land is regarded as having personal property, whereas a freeholder (that is to say, a person who is entitled to an interest in land other than by virtue of a lease) is said to have real estate or real property. The fact that personal property includes both leasehold interests and moveables has led to the use of the terms *chattels real* and *chattels personal*, in order to distinguish between these two kinds of personal property.

(ii) Immoveable and moveable.

(iii) Chattels real and personal.

(iv) Modern tendency to assimilate the rules for each.

The Property Legislation of 1925, which came into force when that year expired, removed many of the old distinctions between real and personal property; and, in fact, several of these distinctions had already been abolished by previous legislation—e.g. the Land Transfer Act, 1897, as we have already observed, had provided that real property shall devolve upon personal representatives. In particular it may be mentioned that the Administration of Estates Act, 1925, which now embodies this provision of the Act of 1897, introduced a welcome uniformity in the rules applicable on intestacy, and in the rules which govern the rights of beneficiaries under a will when the testator's estate is inadequate to provide all the benefactions which the will contains.[2] Nevertheless, despite this growing uniformity in the law of property, it is still very important to be at ease with its somewhat archaic terminology; for phrases such as "real estate," "chattels real," and "personal property" are still current in the language of the law.

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[1] E.g. Cheshire's (3rd ed.), or Goodeve and Potter's, or Williams's (24th ed.) *Real Property*; Rivington's *Law of Property in Land*; Goodeve (7th ed.) or Williams (18th ed.) on *Personal Property*.

[2] Ss. 34 (3), 45–7; also 1st Sched., Part II.

(v) Chattels personal or pure personalty.

Chattels Personal (i.e. personal property other than leaseholds) are now commonly described as *Pure Personalty*, in order to emphasise the exclusion of leasehold interests in land.[1] Moreover, pure personalty itself comprises two very different kinds of property known as *choses in possession* and *choses in action.* Choses in possession, as the name suggests, denotes chattels such as furniture and money which, being tangible objects, can be actually and physically possessed by their owner. Choses in action, on the contrary, are intangible forms of property, such as debts, which are incapable of physical possession; their owner, therefore, is usually compelled to bring an action when he desires to enforce his rights over property of this nature, for he is unable to lay his hands upon any specific article and claim it as his own.

(*a*) Choses in possession.

(*b*) Choses in action.

(vi) Recent legislation tends to contrast land with pure personalty rather than realty with personalty.

The importance of the phrase "pure personalty" has been emphasised in recent years. There is a tendency in modern legislation to group leaseholds with freehold interests in land and to create similar rules for each. This naturally tends to isolate Pure Personalty from Land in legal classification; for, however desirable it may be to create uniform rules for all kinds of property, it is obvious that land, being by nature immovable and permanent, can never be amenable to precisely the same rules as those appropriate to convertible and temporary forms of property such as furniture and debts. Illustrations of this tendency may be found in the provisions of the Property Legislation of 1925 with reference to conveyancing, settlements, trusts, and estates.

Interests in Property

Interests in Property.

(i) Absolute ownership of chattels.

(ii) No absolute

In legal theory whereas a man may be the absolute owner of a chattel, absolute ownership of land is impossible except by the Crown. This is a relic of our feudal system of tenure whereby all holders of English land hold it as tenants of ownership of land.

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[1] The phrase "*Personal chattels*" is sometimes used by an Act of Parliament in a specially restricted sense defined by the Act for its own purposes, e.g. Bills of Sale Acts, 1878 and 1882. An important illustration occurs in the new intestacy rules enacted by the Administration of Estates Act, 1925, ss. 46 (1), 55 (1) (x)—see *post,* Ch. II, *D.* Hence it is preferable to use the phrase "*Pure Personalty*" (rather than "*Chattels Personal*") for general purposes, in order to avoid confusion.

the King or of some mesne lord. In point of fact, at the present day the only type of tenancy which substantially curtails the tenant's rights of ownership is the *leasehold* tenancy (or term of years), which usually casts onerous duties upon the lessee, compelling him so long as the lease endures to do various things, such as repair the premises and pay rent to his landlord, the lessor. Nevertheless, in theory even a *freeholder* is at best a mere tenant of his land; and the greatest interest allowed to him therein by law is properly described as an *estate in fee simple*—though, in fact, it is practically absolute ownership.

Leasehold interests—for years.

Freehold interests—in fee simple.

(iii) Restricted interests:

(*a*) Trust property.

A person who has any proprietary interest, however, whether in land or in chattels, may find his rights restricted in several ways. In the first place he may be a mere *trustee* of the property, obliged to hold it on behalf of certain persons, either because it was conveyed to him expressly for their benefit, or because he chose to declare himself trustee for them. Or, secondly, his ownership may be *concurrent* with that of other owners of the same property, who are entitled to it jointly (or in common[1]) with him. The obvious advantage of employing several trustees to ensure the due performance of a trust frequently leads to a combination of these two arrangements, so that two or more persons hold the property jointly upon trust for the specified beneficiaries.

(*b*) Co-ownership.

(*c*) Equitable interests:

A person for whose benefit property is held on trust is said to have an *equitable* interest in that property, for in former times his only protection against faithless trustees lay in the Court of Chancery and the "rules of equity" which it applied. Other interests in property were protected by the Courts of Law, and are accordingly known as *legal interests*. Thus the absolute owner of a chattel, the tenant of a lease, and the freehold tenant in fee simple have legal interests, whether they are mere trustees or are holding for their own benefit; and if they hold their interests upon trust for other persons the latter are said to have equitable interests in the property.

For life.

These equitable interests may be of various kinds. Thus, although it is not possible to give a direct legal interest in property to a person for his *life* only, substantially the same result may be obtained by transferring the absolute or fee simple interest therein to one or more trustees to hold it upon trust for him for the period of his life, whereupon he will acquire an *equitable life interest* in the property.[1] Moreover, it is equally possible by this method to create a future interest which is to arise after the expiration of such a life interest; such a future interest is known as a *remainder*, and may itself be either a life interest, or an absolute or fee simple interest, or otherwise. In fact, whenever the absolute owner of property desires to settle it in such a way as to give the donees mere limited interests in that property, it is necessary to vest the absolute interest in one or more trustees upon trust to give effect to the limited interests desired for the beneficiaries.[2] Accordingly, the donees (or beneficiaries) obtain *equitable* interests in the property in question, whereas the legal ownership is held by the trustees.

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[1] Interests *in common* differ from *joint interests* in that the "right of survivorship" exists in the latter; i.e. if one of several joint owners dies his interest ends, thus augmenting the rights of the survivors. But if one of several owners in common dies his interest remains; he has therefore power to dispose of it by his will. See also *post*, pp. 44, 51–2.

Remainders.

Entailed interests.

The entailed interest (or estate tail) is another important equitable interest. Its chief peculiarity at the present time is that it is now the only remaining *inheritable* interest in property. On the death of the person to whom it is given it passes automatically to his lineal heir (the "*heir of his body*"). On the death of this heir it will devolve upon the next lineal heir, and so on, until no more descendants of the original donee remain, whereupon the entailed interest comes to an end.[3] The result of this quality of heritability is that these interests are most frequently created by marriage settlements, in order to keep property in the family and to provide for the issue of the marriage. In certain circumstances, however, the owner of the entailed interest is able to convert his entailed interest into an absolute or fee simple interest—a procedure which is known as "*barring the*

The same method is necessary if it is desired to give persons an interest *in common* in *land*; for such an interest (unlike a joint interest) cannot now exist as a legal estate. (Law of Property Act, 1925, s. 1 (6).)

[2] This is not essential in gifts by will, for the testator's personal representatives, on whom the property devolves, will hold it upon the required trusts unless and until other trustees are appointed.

[3] Before 1926 *fee simple estates* also were inheritable, on the death of a fee simple owner intestate. An estate in fee simple (unlike an entailed interest) passed on intestacy to the *heir general*; hence, on default of descendants, an ancestor or collateral relation might inherit. For the present position see Administration of Estates Act, 1925, ss. 45, 46; also *post*, Ch. II, *D*.

entail";[1] and when this has been done he can, of course, dispose of this absolute interest either during his lifetime or by his will. Moreover, since an absolute or fee simple interest is not inheritable, his interest, if he dies intestate, now devolves according to the ordinary intestacy rules—and does not descend merely to heirs of the body as it would have done had it remained entailed.

Conditional interests.

Finally, it should be noted that *conditions* may be attached to gifts of equitable interests. Thus, the gift of an interest for life or in tail or in fee simple may contain a condition that the donee's interest is not to mature in his favour unless and until some event (e.g. his marriage) occurs; or, conversely, it may provide that his interest will cease or will pass from him to some other persons on the happening of some specified event (e.g. if he marry without the consent of his parents). In either case his interest must necessarily be equitable, for he cannot be said to have an absolute interest in the property. Consequently, the legal ownership of the property must needs be held by some trustee on his behalf.[2] Or, again, the gift may even empower some third person to decide who is to have the benefit of it; here, also, the gift is made to trustees, with a direction that they are to hold the property upon trust for whomsoever that person shall appoint.[3]

Powers of appointment.

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[1] Law of Property Act, 1925, s. 130 (1), extending the Fines and Recoveries Act, 1833. See *post,* Ch. V, *A*, for the circumstances in which the owner of an entailed interest can now dispose of the property by his will without first barring the entail.

[2] See p. 13, n.2, *supra.* The validity and effect of these conditions are considered in Chapters IX and X, *post.*

[3] As a rule the power enables him to appoint only members of some specified class—e.g. the donor's children. It is then called a *special* (as opposed to a *general*) power of appointment. See *post,* Ch. V, *A.*

CHAPTER II

SKETCH OF HISTORICAL DEVELOPMENT

A. WILLS[1]

Before the Conquest.

MANY of the fundamental principles which underly our modern law of wills were already established in the Roman Law some fourteen centuries ago. These principles did not take root in England, however, until after the Norman Conquest.

It is true that so-called "Anglo-Saxon wills" were made for over two hundred years before the Conquest by which men might fix the destination of their lands and chattels. But it appears that these "wills" usually came into force immediately they were made, and, once made, could not be altered if the testator changed his mind. If this was so they were neither ambulatory nor revocable, and were therefore more closely akin to our *inter vivos* conveyances—or even to contracts—than to wills in the modern sense.[2] Apparently, moreover, these "wills" were not required to be in writing. When writing was used it served only as a record of dispositions which had already been made, lest the witnesses who were present when a testator spoke his "will" should die or forget in whose favour he had spoken.[3]

After the Conquest.

This state of things persisted for some time after the Norman Conquest. But, meanwhile, it is important to observe that the church had been taking a considerable interest in the devolution of property on death. In those days priests were the persons most likely to hear a man's "last words," and the church usually received substantial benefits from his "will" if he could be persuaded to make one. The church therefore supported this system; and its powerful ecclesiastical courts had, in the Canon and Roman Law with which they were familiar, a highly developed doctrine of testaments which they were ready to apply when occasion arose. The King's Courts, however, were jealous competitors, and were particularly hostile to any interference with their growing jurisdiction over disputes concerned with land.[1] It is true that they did not bother over much about leasehold interests in land: but *freehold* interests (or "real property") were their special province; consequently, the testamentary jurisdiction of the ecclesiastical courts was finally restricted to chattels and leasehold interests in land, or, to use an inclusive phrase, to wills of *personal property.*

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[1] See Holdsworth, *History of English Law*, II, 90–96; III, 534–63; IV, 417–67; VI, 385; VII, 362–73. Pollock and Maitland, *History of English Law*, II, 312–61.

[2] See Pollock and Maitland, II, 314–21, for three varieties: (i) the *post obit* gift, (ii) the death-bed declaration, or "last words," (iii) the *cwide*. See also Whitelock, *Anglo Saxon Wills*, for examples from the tenth and eleventh centuries, with an illuminating General Preface by Professor Hazeltine, who shows that they were often contracts rather than conveyances.

[3] Hazeltine, *op. cit.*, viii.

Wills of Personal Property

Wills (or "Testaments") of Personal Property:

(i) Rights of widow and children.

In the thirteenth century, only a man who left neither wife nor child could bequeath the whole of his personal property; for, generally speaking, if he left a wife or children they were automatically entitled to a proportion of it at his death.[2] But during the fourteenth century it became the general rule that every man was entitled to bequeath the whole of his personalty (though exceptions in favour of the widow and children persisted in some localities until the early eighteenth century);[3] and this is the rule to-day. A movement is now afoot to restore something of the earlier system; for the fact that a testator is able at his whim to beggar his dependants, by bequeathing his property elsewhere, is bound to produce cases of hardship. Efforts have therefore been made to alter the law, so as to enable such persons to apply to the Court for a more equitable distribution of the property; but proposals of this nature have not yet found favour with the legislature.[4]

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[1] Hence the frequency of writs of "prohibition" addressed to ecclesiastical judges in the early part of the thirteenth century forbidding them to hear pleas concerned with lay fees. See Pollock and Maitland, I, 229.

[2] Different customs existed in particular localities; but usually he could dispose only of one-third if he left a wife and children, or one-half if either a wife *or* children survived him. The remaining disposable fraction was known as "the dead's part."

[3] In 1724 the last remaining exception was abolished (City of London); others had existed in Wales (till 1696) and in the ecclesiastical province of York (till 1704).

[4] E.g. Inheritance (Family Provision) Bill, 1934, rejected by the House of Commons.

(ii) Formalities.

At first, wills of personalty required no special formalities. But in 1677 the Statute of Frauds imposed such severe requirements upon an oral (or "nuncupative") will if the property exceeded £30 in value[1] that, thereafter, wills were usually made in writing. *Written* wills of personalty, however, were relatively free from formalities: no witnesses were necessary; and the testator was not even required to sign the document, provided that it was written in his own hand (a "holograph" will) or by someone else on his instructions. These rules persisted until the Wills Act, 1837, which, as we shall see in a later chapter, created a uniform set of rules whereby all wills, with one exception, are now required to be in signed writing attested by two or more witnesses. The only exception refers to wills of personalty made by *soldiers and sailors*; and these have always been exempt both from the formalities imposed by the Act of 1837 and from those imposed by the Statute of Frauds.

Wills of Freehold Land

Wills of freehold land (or "real property"):

(i) Impossible at common law.

By the end of the thirteenth century the Royal Courts, having ousted the Church from its pretensions to control wills of real estate, decided that no man should be allowed to devise his freeholds. Probably this decision was due to the system of land tenure which these courts were applying throughout the country; for one of the fundamental principles of this system was that on the death of a freeholder his estate (unless a mere life interest) was bound to devolve upon his *heir*, if he had one, and that failing an heir the estate returned to his lord. Indeed, the very words which were then essential to the creation of such an estate signified that the heir was intended to succeed to it. Whether a man held land in fee simple or in fee tail, the words of limitation ("and his heirs," or "and the heirs of his body") which had been used when the land was originally granted to him spoke of inheritance. Accordingly, whatever he might say or write in his will or testament, the land would pass automatically to his heir immediately he died.

Except by local custom.

In a few favoured localities freeholders were allowed by law the exceptional privilege of devising their fee simple interests in land. Thus in Kent, where the custom of *gavelkind* prevailed, wills of land were allowed by law;[1] and a similar privilege existed in the City of London and in many chartered boroughs by grant from the Crown. Elsewhere, however, a freeholder who held an estate of inheritance at his death could not prevent it from devolving upon his heir; and the rules of inheritance by which this heir was ascertained were often grossly unfair; for by virtue of the doctrine of *primogeniture* the eldest son inherited to the exclusion of daughters and younger sons.

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[1] At least three witnesses were necessary, and unless the will was put into writing within six days their evidence was not admissible after six months from the making of the will.

(ii) Uses or trusts of land were devisable.

As might be expected, freeholders sought and eventually found a method of evading this harsh rule. The evasion became possible when the Court of Chancery evolved the "*trust*" or "*use*" of land in the early fifteenth century. A freeholder who desired to devise his land would convey it during his lifetime to some selected person upon trust to hold it for himself during his life, and after his death for whomsoever he should name in his will; or, in more technical language, he conveyed it to them to hold to the uses declared in his will. Naturally enough the King's Common Law Courts refused to enforce an arrangement of this kind; for its object was to evade the legal rule against wills of land. In their eyes, therefore, the conveyance transferred the full legal ownership of the land to the persons concerned, without imposing upon them any obligation to hold it for the benefit of the grantor or to observe the provisions of his will. The Court of Chancery, however, took a different view, and compelled them to hold the land as trustees on the terms agreed. Thus, whereas it was still technically impossible to devise a legal estate in freehold land, the *beneficial* or *equitable* ownership could be devised by will; and this meant no more than that a man who wished to devise his lands must first convey them to trustees.

(iii) Direct devise permitted by the Statute of Wills, 1540.

This system flourished until the Statute of Uses was passed in 1535. The Statute of Uses (until conveyancers discovered means of evading it) for a time practically abolished trusts of freehold land, and therefore destroyed the current method of devising real property. In 1540, however, this hardship was removed by the *Statute of Wills*; and thereafter all freehold tenants in fee simple were allowed to dispose of their land by will, whether it was held by trustees for them or not.[1]

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[1] Another peculiarity of gavelkind was that on intestacy freehold land devolved upon all the sons of the deceased as co-heirs, whereas the normal rules of inheritance preferred the eldest son (see *post*, section *D*). This characteristic was removed by the Administration of Estates Act, 1925, s. 46.

(iv) Entailed land not devisable before 1926.

A tenant in fee tail, however, was never permitted to devise his entailed land. Admittedly, he was sometimes able to "bar the entail," and thus convert his interest into a fee simple estate. But if his interest was still entailed when he died he could not dispose of it by his will, and, consequently, the heir of his body, if he left such an heir, was certain to inherit it. This rule remained unchanged until the Law of Property Act, 1925,[2] introduced a relaxation which we shall examine in a subsequent chapter.[3]

(v) Formalities prescribed for wills of realty.

The only formality which the Statute of Wills prescribed for wills of real property was *writing*. The Statute of Frauds, 1677, however, enacted that henceforth this writing must be *signed* either by the testator or by some other person in his presence and by his direction, and be *attested* in his presence by three or four credible witnesses. The Wills Act, 1837, substantially re-enacted this rule, but reduced the number of essential witnesses to two. Thus the formalities required by law for wills of real property and personal property were, after 1837, identical. And in 1918 the Wills (Soldiers and Sailors) Act, of that year, completed the process of assimilation by enacting that *soldiers and sailors*, who had hitherto enjoyed the privilege of making an informal will of personalty only, can make informal wills of real property also.

(vi) Wills of realty before the Act of 1837 covered only property vested in testator at the date of the will.

When the Common Law Courts were compelled by the Statute of 1540 to recognize the will of real property, they gave it to the revocable and ambulatory character which the ecclesiastical courts had already impressed upon wills of personalty. But in one important respect the will of real property inherited something from its predecessor—the old conveyance to trustees to hold to the uses of the testator's will. An obvious shortcoming of the older method was that a man could not convey land to trustees unless he already had it; consequently the uses declared by his will could only cover such land as he had when he made that conveyance. Arguing on somewhat similar lines, the judges of the Common Law Courts decided that even the direct wills allowed by the Statute of 1540 could only affect such land as the testator had at the moment when he made his will. Thus, whereas wills of personalty were allowed by the ecclesiastical courts to include everything belonging to the testator *at his death*, those of real property could not include any land which had come to him after he had made (or re-published) his will; and this peculiarity of wills of real property was not abolished until the Wills Act, 1837 (s. 24).

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[1] In the case of land held by military tenure the Statute allowed only two-thirds to be devised. But this anomaly disappeared with the Act for the Abolition of Military Tenures, in 1660.

[2] Section 176. [3] *Post*, Ch. V, *A*.

The Courts Concerned with Wills

The Courts concerned with wills.

Until now we have assumed that wills of personalty were governed by the ecclesiastical courts, whilst those of real property were jealously confined to the Courts of Common Law. Broadly speaking, this was true until the reorganisation of tribunals in the nineteenth century deprived the church courts of their testamentary jurisdiction,[1] and replaced the old Courts of Common Law and Chancery by one High Court of Justice.[2] Nevertheless, this ancient function of the ecclesiastical courts was already on the wane before the end of the seventeenth century; for the Court of Chancery, ever anxious to step in and remedy possible injustices, was making serious encroachments upon their jurisdiction. In particular, it had already assumed jurisdictions on questions of construction or interpretation,[3] and in these matters it soon became supreme. The Court of Chancery, however, did little to modify the distinctions between wills of realty and personalty which had already developed; and even at the present day various nice distinctions persist between devises and bequests, attributable to differences in their historical development.[4]

B. PERSONAL REPRESENTATIVES[5]

Executor.

Although even the Anglo-Saxon "wills" often attempted to persuade some person or other to protect or even to carry out the provisions which the "will" contained, the office of *executor* did not begin to acquire its modern significance until the thirteenth century. Until that time the *heir* was apparently regarded as the appropriate person to collect the deceased's assets and to pay debts and legacies thereout. The duty of the executor whom the deceased had named in his will was merely to see that these legacies were in fact paid; and probably the heir, after paying creditors and allotting to the deceased's widow and children their proportion of the remaining personalty, handed the balance—"the dead's part"—to the executor for the legatees.[1]

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[1] Court of Probate Act, 1857, s. 23.

[2] Judicature Act, 1873.

[3] See Holdsworth, *History of English Law,* V, 319–20.

[4] E.g. the rules applicable to *Conditions*; see *post,* Ch. IX.

[5] See Holdsworth, *History of English Law,* I, 626–30; II, 96–97; III, 550–95; V, 316–20; VII, *passim.* Pollock and Maitland, *History of English Law,* II, 332–46.

During the thirteenth century, however, the executor, who had been hitherto a mere creature of the ecclesiastical courts, obtained recognition from the Royal Courts. Magna Carta (1215), Cap. 26, clearly stated that he was to take and distribute the surplus personalty after debts had been paid; and some years later the King's Courts decided that he, and not the heir, was the proper person to collect the assets and to sue or be sued for the debts due to or from the deceased.[2]

Administrator.

If a deceased person died intestate, the problem was somewhat different, for, having left no will, he had appointed no executors. In such a case his personal property devolved in the thirteenth century upon the Ordinary[3] (the bishop of the diocese), who usually appointed an *administrator* to distribute the property; and a statute of 1357[4] compelled him to select near friends of the deceased for this purpose, and enabled persons so selected to sue and be sued for the debts of the deceased. Here, again, the deceased's widow and children (if any) must be paid their proportion of the surplus assets; but the residue—the dead's part—was distributed "in pious uses" for the repose of his soul.[5]

In 1496 it was enacted that the ordinary may grant administration to the widow or next of kin of the deceased; and in 1670 the first Statute of Distribution cleared up what had become a very vague and unsatisfactory state of affairs by finally deciding that all the surplus personal property, after payment of debts, must be divided between the widow and near relations according to a fixed scheme. This scheme with a few minor statutory amendments remained in force until 1926, when, as we have already observed, the Administration of Estates Act, 1925, abolished the old rules of descent on intestacy and established a new set of rules which govern real and personal property alike.[1]

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[1] See e.g. Assize of Northampton, 1176, Article 4.

[2] The heir, however, having inherited the deceased's land, remained liable for any *specialty* debts as to which the deceased had expressly bound his heirs.

[3] 13 Ed. I, st. 1 (Westminster II), c. 19.

[4] 31 Ed. III, st. 1, c. 11.

[5] Magna Carta, 1215, cap. 27.

Personal representatives are now real representatives also.

Thus it may be said that during the thirteenth century the executor became the *personal representative* of a person who had made a will, and in the fourteenth century the administrator became the personal representative of one who had died intestate. But neither of them was, as yet, a *real representative*; for the real property of a deceased person passed direct to his heir or (when wills had been legalised by the Statute of 1540) to the person to whom he had devised it by his will. And this anomaly was not finally removed until the Land Transfer Act, 1897,[2] enacted that thereafter the real property of a deceased person should first devolve upon his personal representatives, and should be available in their hands for the payment of his debts. At the present day, therefore, executors and administrators, though still described as "personal representatives," are, in fact, *real* representatives also.[3]

C. PROBATE[4]

Probate of wills of personalty

By the end of the twelfth century the ecclesiastical courts had assumed jurisdiction over questions about disputed wills; and soon afterwards they undertook the function of pronouncing upon the *validity* of wills of personal property. Thus, it transpired that wills disposing of personal property were usually required to be "*proved*" in the court of the Bishop of the diocese in which the testator had dwelt;[5] for, by so "proving" the will, the executor established both his claim to act as the testator's personal representative and the validity of the will as a whole. The Common Law Courts acquiesced in this arrangement, and by the fifteenth century were content to accept the Ordinary's grant of "probate" as conclusive evidence that the will was valid. Occasionally there was some slight interference from the Court of Chancery; but this court eventually satisfied itself by usurping another branch of ecclesiastical jurisdiction—the power to decide questions of construction and interpretation.

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[1] The intestacy rules are given *post*, pp. 24–29.

[2] Part I, now repealed and substantially re-enacted by Administration of Estates Act, 1925. See *post*, p. 44, for those interests which do not devolve upon personal representatives.

[3] As regards special personal representatives for the purposes of settled land, see *post*, p. 52, note 2.

[4] See Holdsworth, *History of English Law*, I, 625–26, 640; III, 539–40. Pollock and Maitland, *History of English Law*, II, 339–40.

[5] In some districts, however, a local court had testamentary jurisdiction—e.g. the London Court of the Hustings.

Wills of realty.

When wills of real estate became permissible in the sixteenth century the ecclesiastical courts were not allowed to interfere. The Courts of Common Law neither required nor recognised probate of wills of real property. If such a will contained also dispositions of the testator's personal property, or nominated executors, the ecclesiastical court would naturally grant probate of its contents; but even here the Royal Courts refused to recognise the grant as conclusive so far as it referred to dispositions of real estate, for in their eyes the only conclusive evidence of a devise was the will itself.

Abolition of ecclesiastical jurisdiction.

The next stage in the history of Probate begins with the Court of Probate Act, 1857. This Act created a new Court of Probate to exercise probate jurisdiction, and thereafter the ecclesiastical courts were no more concerned with the matter. The Act also gave this new court authority to grant probate in solemn form of wills of real estate. But a few years later the Judicature Act, 1873, transferred its jurisdiction to the newly constituted Probate Divorce and Admiralty Division of the High Court of Justice, and there it remains to-day.

Final uniformity.

Finally, the Land Transfer Act, 1897, Part I (since replaced by the Administration of Estates Act, 1925[1]), has produced uniformity in the rules concerning grants of probate; and, consequently, these grants became as conclusive for wills of realty as they had formerly been for wills of personalty. Moreover, as we have seen, this Act conferred upon personal representatives the same authority over realty as they had enjoyed over personal property (including leaseholds) for many centuries. Thus, real property has become equally available with personal property for the payment of the deceased's debts, and the executor (or administrator) has power to sell it for this purpose. But any property, whether real or personal, which remains after the debts have been paid, he will transfer[1] to the devisees or legatees entitled thereto by virtue of the will, or, failing them, to the persons entiled under the rules of intestacy.

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[1] Ss. 1–21: See also Judicature Act, 1925, ss. 159–169, which has replaced ten of these sections relating to matters of probate and adminisintration.

D. INTESTACY RULES

We have already observed that the law prescribes certain rules which govern the distribution of a deceased person's property in case he dies intestate. If the deceased dies wholly intestate these rules apply to his entire estate; and if he leaves a will which effectively disposes of only part of his property they govern the devolution of what remains. These rules, as we have seen, were radically changed by the Administration of Estates Act, 1925, which applies to the property of all who die intestate after 1925. This Act provides a uniform code of intestacy rules in place of the old rules which differentiated between real and personal property. The old rules, however, are still important. It is true that they are directly concerned with the devolution of an intestate's property only if his death occurred before 1926. Nevertheless, their leading characteristics must be known even to-day before one can face some of the problems which arise in the law of wills. The following brief outline, though by no means exhaustive, summarises the rules as they existed immediately before 1926, and concludes with a synopsis of the modern rules which have now replaced them.

Death Before 1926

Death before 1926:
(1) Personal property.
(*a*) Widow and children.

The Statutes of Distribution, 1670 and 1685, enacted that a man's undisposed of *personalty* be divided, after his debts have been paid, among his widow and children. The widow obtained one-third share, and the remainder was divided equally among his children. If he left no widow the children took all: if no children, the widow took one-half.[1] But the rights of any child, who died before him leaving issue, were preserved for the issue of that child; or, as was commonly said, the issue of a deceased child represented that child *per stirpes*.

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[1] This transfer is effected either by an ordinary conveyance, or by an *assent*—which (after 1925) must be in signed writing if it is to pass a legal estate in land. (Administration of Estates Act, 1925, s. 36.)

(*b*) **Widower.**

On the death intestate of a married woman, however, her husband took the whole of her personal property if he outlived her; and thus her children were entirely excluded in his favour.

(*c*) **Father; or mother, brothers, an sisters.**

If a person died intestate leaving neither spouse nor issue, his or her father was entitled to all the personal property. And if the father was already dead the mother, brothers, and sisters of the intestate took in equal shares. These rules applied also to the case where a man died intestate leaving a widow but no issue, save that the widow first took one-half as already stated.

The rules concerning more remote relations are too technical for our present purposes. Two noteworthy characteristics of the old system, however, should be borne in mind. First, the children (or brothers and sisters) of the deceased were equally treated irrespective of their age or sex. Secondly, it would be inaccurate to state that the "*next of kin*" of the intestate took his personalty; for his parents and his children are equally nearly of kin to him, yet the children (if any) were preferred; moreover, the widow or widower invariably benefited, though husband and wife are not necessarily related to one another. Hence, if we desire to describe the persons to whom personalty passed on intestacy it is necessary to seek some other phrase, such as "next of kin according to the Statutes of Distributions," or, more shortly, "statutory next of kin," in order to make our meaning clear. And even these phrases, being limited to "kin," will not, as a rule, include a wife or husband; hence, if our description is to include the husband or wife some more cumbersome phrase is necessary—e.g. "the person or persons entitled under the

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[1] The Intestates' Estates Act, 1890, gave the widow a further benefit if her husband died wholly intestate and without issue—a first charge of £500 upon the whole of his estate; she would then take also the usual half of the remaining personalty. The phrase "Statutes of Distribution," however, does not properly include this Act, e.g. if the phrase is used in a gift by will. (Administration of Estates Act, 1925, s. 50 (2); *Re Morgan*, [1920] 1 Ch. 196.)

Statutes of Distribution to the undisposed of personalty" of X.[1]

(ii) Real property before 1926:

(a) Inheritance.

The rules which governed the devolution of *real property* upon intestacy before 1926 are properly termed rules of *inheritance*; for, whether the deceased had an estate in fee simple or in tail,[2] his estate devolved upon his *heir*.[3] We have already seen, however, that an estate tail was inheritable only by a limited class of heirs ("heirs of the body"—i.e. descendants); but an estate in fee simple was inheritable by any relation, however remote, who proved his relationship with the deceased and showed that no superior claimant existed.

These rules of inheritance were eventually codified by the Inheritance Act, 1833, and thereafter remained substantially unaltered until 1926. Their outstanding characteristics have always been (i) that males were preferred to females of the same degree,[4] and (ii) that among males of equal degree the eldest was preferred.

Thus if a person had two sons and two daughters, the elder son was his heir. The younger son was heir only if the elder had died before the father, leaving no descendants; for any descendants of the elder son were preferred to the younger son (and his descendants). If, however, both sons had died before their father, and had left no descendants, the *two daughters* inherited. Indeed both daughters inherited together as co-heiresses ("coparceners")—for age is immaterial among females of the same degree. But if only *one daughter* outlived the father she was his sole heir; except, of course, if the other daughter had left descendants, in which case the heir of the deceased daughter inherited as co-parcener with the surviving daughter.

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[1] See *post*, s.t. Construction, pp. 144–145. See Administration of Estates Act, 1925, s. 50, for the construction of such phrases when used in a will or other document.

[2] *Life* estates were not inheritable. If the deceased held for his own life the estate ended at his death. In the rare cases where he held for the life of another person the estate persisted until that other person died, and devolved meanwhile upon the intestate's *next of kin*, unless originally granted to him "and his *heirs*."

[3] If the intestate had himself acquired the estate by inheritance it devolved, on his death intestate, upon the *heir of the last purchaser*: see Inheritance Act, 1833, s. 2, and Lord St. Leonard's Act, 1859, s. 19. But if he had acquired it by deed or by will it devolved upon *his own heir*.

[4] If it be desired that only *female* descendants shall inherit, this can be done by creating an estate *in tail female* (e.g. to A "and the heirs female of his body"). Similarly female descendants are excluded from inheriting an estate in *tail male* (e.g. to A "and the heirs male of his body"). But such restrictions on inheritance, though possible in entailed interests, were never allowed in an estate in fee simple.

In default of descendants the deceased's father (if living) was his heir. And if the father was already dead, the heir was sought among the father's descendants, according to the two rules mentioned above. Hence, the intestate's brothers and sisters (and their descendants) were now eligible. Next came the father's father, if alive; and failing him his descendants (e.g. uncles or aunts of the deceased), again preferring the male to the female line, and the elder male to the younger male. And so on.

(*b*) Widow or widower of the intestate.

The heir, however, took the land subject to certain rights reserved by law for the intestate's wife or husband. The widow of an intestate husband was usually entitled to "dower" from his freehold land—viz. a life estate in one-third of it.[1] On the other hand, if a married woman died intestate, her widower was entitled to "*curtesy*"—viz. a life estate in the *whole* of her freehold land. In either case this was merely a *life* interest for the surviving spouse; consequently, it did no more than postpone the heir's rights to the land until the spouse died.

Death After 1925

Death after 1925:

(*a*) Entails—as before.

(*b*) Other property.

On death intestate after 1925, the old rules of distribution and of inheritance are no longer applicable, save that *entailed interests* (which may now be created in personalty as well as in realty[2]) are still subject to the rules of inheritance which governed estates tail before 1926.[3] With this exception the Administration of Estates Act, 1925, enacts that henceforth all the undisposed of property of a deceased person shall be held by his personal representatives upon trust for sale,[4] and that after his debts have been paid they shall distribute what remains in the manner described by ss. 46–48 of that Act.

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[1] The dower was in addition to the £500, raised rateably from realty and personalty, conferred upon her by the Intestates' Estates Act, 1890, if the husband had died wholly intestate and without issue. See p. 25, note 1, *supra*.

[2] Law of Property Act, 1925, s. 130 (1).

[3] Administration of Estates Act, 1925, ss. 45 (2), 51 (4); Law of Property Act, 1925, s. 130 (4). Curtesy (though not dower) is still possible from entailed interests. See also Administration of Estates Act, 1925, s. 51 (2), which preserves the old rules of descent of real property in certain cases on the death of a lunatic intestate.

[4] S. 33; cf. ss. 1, 3 (3).

(i) Relatives.

These sections treat all property alike, whether it be real or personal; moreover, neither seniority nor sex affects the rights of the persons who may benefit. If we ignore for the moment the important provisions made for a surviving spouse, the approximate result is that when a deceased person leaves descendants his property is divided *equally between his children*; and the issue of any child who dies before him take that child's share. Should the deceased leave no descendants, his *parents* take all ; but if both of his parents die before him his brothers and sisters are entitled,[1] and if any have died leaving issue, the issue take his or her share. Failing any of these relations the *grandparents* of the intestate take all; but if each of the four grandparents have died before him his uncles and aunts are entitled,[1] and the shares of any who have already died leaving issue are preserved for their issue, as before. Finally, if none of the above relations is available the surviving spouse (if any) takes everything; and, failing this, the whole of the property goes to the Crown, as *bona vacantia*.

Although these modern rules are somewhat similar to those which governed the distribution of personal property before 1926, there are several noteworthy differences: (i) No relation more remote than grandparents and their descendants can benefit. (ii) The surviving spouse takes all if none of these relations is available. (iii) None of these relatives obtains a vested interest unless and until he or she attains 21 years of age or marries under that age. (iv) Moreover, if the deceased has made advances to his *children* during his lifetime, or has given any property by his will to any of his *issue*, the gift must be taken into account when ascertaining the share to which such child or issue is entitled.[2]

(ii) Widow or widower.

Finally, the Act of 1925 provides equal treatment for a surviving spouse, whether widow or widower of the intestate. The approximate benefits in either case—apart from (ii) above—are (*a*) an absolute right to all "personal chattels" as defined by the Act,[3] together with £1000 as a first charge upon the rest of the estate;[1] and (*b*) either a *life* interest in one-half of what remains, or, if the deceased left no issue, a life estate in the whole. Thus, if the intestate leaves a husband or wife, the children or other relatives take only what remains after these claims have been met.

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[1] Those of the *half-blood* to the intestate are entitled only if none of the whole blood outlive him or leave issue who outlive him.

[2] Ss. 47 (1) (iii), 49. But this is not to be done if it can be shown that the deceased intended otherwise.

[3] See s. 55.

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[1] The £1000 bears interest at 5 per cent per annum, until the date of payment, and is free of death duties. In small estates this, with the personal chattels, often absorbs all the intestate's property, to the exclusion of his children or other relations. In this respect the new rules are open to serious criticism.

CHAPTER III

THE EXECUTION OF WILLS

As we have already seen, a testamentary instrument is ineffective unless it complies with the formalities required by law. Unfortunately, the necessary formalities differ in different parts of the world. Therefore, although our chief concern is with those prescribed by the law of England, we must first examine those principles which English courts apply in order to determine whether a testator ought to observe English formalities or those of some other country.

A. WHAT LAW APPLIES

(i) Common law rules.

The general rule is that whereas a will disposing of *immoveable* property (i.e. interests in land) must observe the formalities required by the law of the country in which the land is situate (the *lex situs*),[1] wills of *moveables* (i.e. pure personalty) are required to follow the rules of that country in which the testator was domiciled at the date of his death (the *lex domicilii*).[2] Thus, the will of a foreigner, resident abroad, who owns both land and pure personalty in this country, must usually follow both the law of England (as regards the land) and that of the country of his domicil (as regards the moveables). Moreover, it is necessary to bear in mind, with relation to the will of a married woman, that her husband's domicil is hers also.

(ii) Wills Act, 1861:

One peculiar hardship resulting from the above rule as to

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[1] *Pepin* v. *Bruyère*, [1902] 1 Ch. (C.A.) 24. Frenchman, domiciled in France, made an unattested will, valid according to French law. The Court of Appeal held it ineffective to dispose of a leasehold house situate in London; for the *lex situs* (English law) requires wills to be attested by witnesses.

[2] By law every person has a *domicil*—i.e. a locality which the law treats as his permanent home. At birth (if legitimate) he acquires the domicil of his father, and this is known as his *domicil of origin*. But after reaching full age he is at liberty to change his domicil, by residing in some other country with intention to remain there indefinitely—i.e. he can thus acquire a *domicil of choice*. A woman on marriage acquires the domicil of her husband; if he subsequently changes his domicil hers automatically changes also (unless meanwhile they have been divorced), so also does that of his infant children. Domicil is altogether distinct from nationality—e.g. a British subject may be domiciled in a foreign country. See Dicey's *Conflict of Laws* (5th ed.), for the rules as to domicil and nationality.

(*a*) Change of domicil (s. 3).

wills of moveables has been removed by s. 3 of the Wills Act, 1861. A person who makes a will while domiciled in one country may subsequently acquire a different domicil—e.g. by marriage, if a woman, or by dwelling in some other country with the intention of making a permanent home there. Before the Act of 1861, such a change of domicil would operate to invalidate the testator's will as regards his moveables, unless, indeed, he reverted to his former domicil before he died; for the common law rule required the will to follow the law of his *domicil at his death*. The Act of 1861 provides, however, that henceforth changes in domicil do not invalidate a will. A will of moveables, therefore, is now equally effective whether it follows the law of the testator's domicil at the date of his death, or that of the country wherein he was domiciled when he made the will.

Thus in *Re Groos*[1] (1904), a Dutch lady domiciled in Holland made a will of her moveable property according to Dutch formalities. She then married a Dutchman who subsequently changed his domicil (and thereby that of his wife) to England. Held: her will was not invalidated.

(*b*) Wills of personalty made by British subjects (ss. 1, 2).

The Act of 1861 has also given certain additional privileges to the wills of *British subjects*.[2] Whatever his domicil may be, a *British* testator can make a valid will of *personal property* by following the rules prescribed by the law of the country where he makes the will.[3] Thus, any British subject, who decides to make a will of his personal property when on a visit to some foreign country or to Scotland or Ireland, or some other part of the British Empire, is at liberty to make it in the form which is current in that locality, and can obtain appropriate legal advice from any competent lawyer there. Moreover, if he is making such a will *outside the United Kingdom*,[4] two further alternatives are open to him; for, should he so desire, he is free to follow either (i) the form prescribed by the law of the place where he is *then domiciled*, or (ii) the form prescribed by that part of His Majesty's dominions in which he had his *domicil of origin*.[5]

(Including leaseholds.)

A curious but important point, in connection with these privileges given to British subjects, is that they apply to wills of *personalty*. They, therefore, extend not only to wills of moveables, but also to those of *leaseholds*. They are inapplicable, however, to wills of freehold land, for this is not personalty; freeholds, therefore, must always be devised by a will which complies with the law of the place where the lands are situate.[1] Even wills of leaseholds must follow the *lex situs* if made by a foreigner. But a British subject, whether British born or naturalised, may elect to follow any of the above alternatives prescribed by the Act of 1861; and the only exception is that a British subject who was *domiciled abroad at his birth* is not able to adopt the alternative mentioned at the end of the preceding paragraph, since his domicil of origin was not within the King's dominions.

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[1] [1904] P. 269.

[2] *Quaere* whether this will include subjects of the Irish Free State, if the Citizens Bill, 1934, becomes law.

[3] Wills Act, 1861, ss. 1(*a*), 2.

[4] The United Kingdom does not now include the Irish Free State. Irish Free State (Consequential Adaption of Enactments) Order, 1923.

[5] Wills Act, 1861, s. 1.

The unattested will of Carlo Grassi, a naturalised British subject, illustrates s. 1 of the Act of 1861. Though domiciled in England, he had made it according to Italian formalities whilst on a visit to Italy. One of its provisions attempted to bequeath certain *leasehold* property situate in London. Had he been a foreigner, this would have been ineffective, for the will did not comply with English law (the *lex situs*), and it was a will of *immoveables*. But being a British subject he had the advantage of the Act of 1861; for it was a will of *personalty*; hence the bequest was valid, inasmuch as it complied with the law of the place where the will was made. *Re Grassi* (1905).[2]

It will be observed that such a will would not have been able to dispose of English *freeholds*, since they are outside the Act of 1861. But had it been made in English form it would have been competent to dispose of any kind of property in England; for the original common law rule permits immoveables to be devised according to the *lex situs*, and moveables according to the *lex domicilii*; and our testator was domiciled in England (*lex domicilii*) and had his land there (*lex situs*). Moreover, in such a case an English will would have been equally effective whether or not he was a British subject, for the common law formalities are available to all testators, of whatever nationality.[3]

Foreign testators.

In view of the fact that the statutory alternatives provided by ss. 1 and 2 of the Act of 1861 are available only to

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[1] But a person for whom freeholds are held on *trust for sale* is treated as having an interest in *personalty*, for his ultimate rights are in the proceeds of sale (i.e. money). See *post*, Ch. VIII, *A*. Hence an unattested will, valid in France, made by a testator domiciled in France, effectively passed his interest in English freeholds, which were held upon trust for him by trustees for sale. (*Re Lyne's Trusts*, [1919] 1 Ch. (C.A.) 80.)

[2] [1905] 1 Ch. 584.

[3] The common law requirements are not destroyed by the Act of 1861 (see s. 4); it merely provides *alternative* formalities.

British subjects, it follows that a *foreigner* who is *not* domiciled in England cannot effectively dispose of moveable property situate in this country by making a will in English form. Admittedly, such a will is capable of passing English land (immoveables—*lex situs*). But as we have seen, it cannot affect his moveables unless made according to the law of the place where he is domiciled at his death (*lex domicilii*), or at the time of making his will (Wills Act, 1861, s. 3).[1] And this is equally so although the foreign testator may be of British origin. For this reason an English lady, who marries a German national domiciled in Germany (and who thereby acquires his nationality and domicil), cannot dispose of English moveables by making a will in English form.[2]

B. THE FORMALITIES NECESSARY WHEN ENGLISH LAW APPLIES

The formalities normally required by English law concentrate upon the "execution" of the will—i.e. the testator's signature and its attestation. Technical phraseology is not essential,[3] nor is it necessary to observe any particular order when drafting the various clauses which set out the testator's wishes. It is sufficient that the will expresses his intentions clearly and without ambiguity.

Informal Wills

(1) Informal wills:

Firstly, let us consider those exceptional cases in which a will requires no formalities whatever—where neither signature nor witnesses nor even writing is prescribed by law. These informal wills are permitted by s. 11 of the Wills Act, 1837, as extended by the Wills (Soldiers and Sailors) Act, 1918; and, if unwritten, they are usually described as "*nuncupative wills.*"

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[1] There is an exception insofar as a foreigner's English will exercises a power of appointment conferred by an English will or settlement. (*Murphy* v. *Deichler*, [1909] A.C. 446, cf. *Velasco* v. *Coney*, [1934], P. 143.)

[2] *Bloxam* v. *Favre* (1884), 9 P.D. 130. But such a will becomes effective if at her death she is domiciled in England, e.g. if her husband acquires an English domicil; or if, after his death, she acquires one of her own volition, or marries a person domiciled in England.

[3] An exception was introduced by the Law of Property Act, 1925, s. 130, requiring technical words of limitation for the creation of an *entailed interest*: the appropriate words are "and the heirs of his body," or "in tail."

Soldiers' and sailors' wills of personalty.

Section 11 of the Act of 1837 enables "any soldier being in actual military service or any mariner or seaman being at sea" to make an informal will of his *personal* estate; and the Act of 1918 explains that this privilege has always included even soldiers, mariners, or seamen who are under 21 years of age.[1] An examination of the decisions on this topic reveals that the courts are inclined to be generous in their interpretation of these enactments. Thus, an army nurse may be a "soldier" for the purposes of section 11,[2] and a female typist employed on an ocean-going liner has been included in the phrase "mariner or seaman."[3] Moreover, a soldier is taken to be "in actual military service" as soon as he has received orders to join a military expedition;[4] and a mariner or seaman is deemed to be at sea whenever he is attached to a sea-going vessel, although at the time of making his will he may happen to be ashore.[3]

Extensions by Act of 1918.

The Act of 1918 extends these privileges in several important respects. It brings members of the Royal Air Force within the term "soldier";[5] it removes the former restriction whereby these informal wills were competent to dispose only of personal property;[6] and it enables these informal wills to appoint guardians of the testator's infant children.[7] It also enables any mariner or seaman *who is a member of His Majesty's naval or marine forces* to make an informal will, not only when he is "at sea," but also when he is so circumstanced that if he were a soldier he would be deemed to be "in actual military service."[8] The effect of this last provision appears to be that a person enrolled in the naval or marine forces of the Crown can make an informal will even if he is not yet attached to a sea-going vessel, provided that he has been ordered to undertake active service on land or sea.

Thus an officer of the Royal Navy who, having received orders to join a certain ship during the Great War, told his son at the

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[1] S. 1. As a general rule an infant *cannot* make a valid will. Wills Act, 1837, s. 7; *post*, p. 55.

[2] *Re Ada Stanley*, [1916] P. 192. Her will was a letter written when on leave, asking the recipient to deal with her affairs. The recipient was granted probate as executrix.

[3] *Re Hale*, [1915] 2 Ir.R. 362.

[4] *Gattward* v. *Knee*, [1902] P. 99; *Re Yates*, [1919] P. 93.

[5] S. 5.

[6] S. 3, i.e. real estate in England or Ireland is now included.

[7] S. 4.

[8] S. 2.

Railway Station that he desired to leave all his property to his wife, was held to have made a valid will. *Re Yates* (1919).[1] This decision, moreover, illustrates the fact that the Act of 1918 applies, whenever the will was made, provided that the testator dies after the Act came into force.[2]

Finally, although a will has no effect until the testator dies, his ability to make an informal will under the above rules is governed by his circumstances at the time of making it. If, therefore, a soldier makes a nuncupative will when *not* "in actual military service" the will is invalid, and the fact that he subsequently goes on actual military service will not cure its invalidity. On the other hand, the informal will of a soldier, who *was* "in actual military service" when he made it, remains perfectly valid even if he subsequently leaves the army and enjoys many years of civilian life before he dies.[3]

Formal Wills

(2) Formal wills.

A testator, who is not entitled to make an informal will under the rules already given, is required by section 9 of the Wills Act, 1837, to observe certain formalities therein prescribed; otherwise his will is invalid.

(*a*) Writing.

In the first place the will must be *in writing*; and although the Act does not specify any particular kind of writing, or, indeed, what language should be used, or on what substance the will should be written, it is clearly advisable to write legibly and to use materials which will stand the test of time. Thus ink, print, or typewriting is safer than pencil; and paper or parchment is preferable to a slate or an egg-shell;[4] yet the will is equally valid in law whichever of these is adopted.

(*b*) Execution:

In the second place the written will must be "executed" in a certain way. The section prescribes three essential elements for the due execution of a will. They are as follows—

(i) Signature.

(i) "*It shall be signed at the foot or end thereof by the testator, or by some other person in his presence and by his*

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[1] [1919] P. 93.

[2] I.e. after the 5th February, 1918.

[3] *Re Booth,* [1926] P. 118: soldier's informal will, made in 1882, admitted to probate on his death in 1924.

[4] See *Hodson* v. *Barnes* (1926), 43 T.L.R. 71.

direction. . . ." This clause has given rise to a great deal of litigation, and in consequence has received extensive judicial interpretation. The testator's signature need not set out his name in full; indeed, his simple initials or his mark[1] are enough; and he may sign in an assumed name,[2] or may employ a stamping device for the purpose. A mere seal, however, will not suffice,[3] for a seal is appropriate only in a deed; but since it is now essential to sign a deed as well as to seal it[4] much of the force of this restriction has gone, for a seal accompanied by the testator's signature is equally effective in the case of a will.[5] Moreover, if another person signs for the testator, that person may sign either the testator's name or initials or his own.[6] In either case it is important to observe that he must sign in the testator's *presence* and by his direction. But there is no rule which compels the body of a will to be written by the testator, or in his presence; for although a testator is free to draft his own will if he so desires,[7] it is usually advisable to instruct a solicitor to prepare it for him.

Wills Act, 1852.

Soon after the Act of 1837 came into operation, several unsatisfactory decisions occurred on the meaning of the phrase "foot or end thereof."[8] The legislature, therefore, hoping to exclude the possibility of further unwelcome decisions, evolved an exhaustive and somewhat verbose definition of the meaning of this phrase, and embodies it in the Wills Act Amendment Act, 1852. It provides, *inter alia*, (i) that the position of the testator's signature (or that of the person who signed on his behalf) shall not invalidate a will if it is placed "at or after, or following or under, or beside or opposite to the end of the will" in such a way as to show that he intended thereby to give effect to the words which the will contains; (ii) that the signature may be inserted in the attestion clause, or even below or beside the signatures of the witnesses; (iii) that a blank space intervening between the end of the will and his signature is no objection; and (iv) that it may validly be placed on a page whereon no part of the will is written, even if there is room for it at the bottom of the previous page. On the other hand, the Act makes it perfectly clear that a signature can never operate to give effect to any part of the will which is written below it, or which is inserted subsequently in point of time.[1]

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[1] This often takes the form of a cross. It is a useful alternative if testator is illiterate or suffers from severe physical disability; but it is permissible even if he is capable of writing his name.

[2] E.g. a married woman may sign in her maiden name or in that of her first husband. (*Re Glover*, (1847) 11 Jur. 1022.)

[3] *Wright* v. *Wakeford* (1811), 17 Ves. 454.

[4] Law of Property Act, 1925, s. 73.

[5] *Re Emerson* (1882), 9 L.R. Ir. 443.

[6] *Smith* v. *Harris* (1845), 1 Rob. 262.

[7] A will drafted by the testator in his own handwriting is usually termed a *holograph will.*

[8] E.g. *Smee* v. *Bryer* (1848), 1 Rob. Ecc. 616: will held invalid because testator's signature was written on a separate page.

Thus, in *Re Stalman* (1931)[2] the will of a testatrix who signed her name at the top of it because there was no room for her signature at the bottom of the page, was held by the Court of Appeal to be entirely void.[3]

But *Re Roberts* (1934)[4] shows that these rules are sometimes construed in a benevolent fashion. Here the testator had written a holograph will upon a sheet of paper, leaving a margin at the left of the page. There was no room for the attestation clause and signature at the foot of the page. He therefore turned the page sideways and wrote them in the margin, so that the clause began at the foot of the margin and terminated with his signature at the top of the margin. Hence his signature was in fact at the beginning of the page. But, since the attestation clause had continued the will up the margin, the signature was beside or opposite to the *end* of the will (as required by the Act of 1861), although it was also opposite the beginning. *Held:* the will was validly executed.[5]

(ii) Witnesses present.

(ii) "*And such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time. . . .*" This clause, again, has led to a vast amount of litigation. It is clear, however, that a testator who actually signs his will in the sight of two or more witnesses, or who produces to them a will which has already been signed (whether by him or on his behalf) and tells them that the signature is his, is within the rule. Apparently, the witnesses need not actually see the signature as he writes or acknowledges it, so long as they have some opportunity of seeing it if they so desire;[1] nor need they know that the document is his will.[2] Moreover, the Act does not require a testator to acknowledge his signature in express words; it is therefore sufficient that he simply requests the witnesses to sign the document before them, without disclosing its nature to them, if they see his signature upon it.[3]

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[1] Hence such parts should be separately signed and attested at their foot or end. (*Re Arthur* (1871), 2 P. & D. 273.)

[2] [1931] W.N. 143; 145 L.T. 339 (C.A.).

[3] See also *Re Smith,* [1931] P. 225.

[4] [1934] P. 102.

[5] See also *Re Coombs* (1866), 1 P. & D. 302. Contrast *Re Usborne* (1909), 25 T.L.R. 519: signature, in margin, *parallel* to the words of the will.

Although it is obviously desirable to secure witnesses who are neither illiterate nor suffering from some mental or physical infirmity (e.g. blindness) which is likely to weaken the force of their testimony, the Act contains no express provision to this effect. Indeed, it provides that, although a witness is or afterwards becomes "incompetent to be admitted a witness" to prove the due execution of the will, the will is not invalid on that account.[4] Even a person to whom (or to whose spouse) the will gives some benefit is now an effective witness;[5] but, as will be shown hereafter, his inclusion among the witnesses usually operates to destroy the benefit in question.[6]

(iii) Attestation and signatures of witnesses:

(iii) "*and such witnesses shall attest and shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary.*" This final clause of section 9 requires the witnesses in whose presence the testator signed, or acknowledged his signature, to add their own signatures to the will. Again, the signature may be by mark or initials; but it is important to observe that a witness is not free to engage another person to sign on his behalf, nor is he allowed the alternative of signing in private and subsequently acknowledging his signature. Witnesses are not required to sign in the presence of each other; hence, if a testator brings two witnesses into his room, and signs the will before both of them, as soon as one witness has signed that witness may depart without waiting to see the other affix his signature; for the testator is the only person whose presence is essential throughout the ceremony.

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[1] See *Blake* v. *Blake* (1882), 7 P.D. 102: acknowledgment; *Smith* v. *Smith* (1866), 1 P. & D. 143: signed in witnesses' presence.

[2] *Keigwin* v. *Keigwin* (1843), 3 Curt. 607.

[3] *Gaze* v. *Gaze* (1843), 3 Curt. 451; *Keigwin* v. *Keigwin* (*supra*).

[4] Wills Act, 1837, s. 14. Thus the *infancy* of a witness is not in itself an objection. But presumably a person cannot be said to "*attest*" the will (see next paragraph) if he is too young or too mentally deficient to understand what he is doing.

[5] S. 15, reversing the earlier rule. The Act of 1837 does not expressly require (as did the Statute of Frauds, 1677, for wills of land) that witnesses be "credible"; but of course they should be so, in case their testimony is required.

[6] *Post*, Ch. V, *C*.

Operative signature must be attested.

Sometimes a testator, whose will covers several pages, signs his name at the foot of each page. Although this is strictly unnecessary, it is a useful method of showing clearly that each page is part of the will and was included therein with his full knowledge and consent. But signatures inserted thus for mere purposes of identification are not within the purview of the Wills Act; hence, they can have no bearing upon the validity of the will, even if they are attested by witnesses. The material or operative signature, with which the Act is concerned, is that whereby the testator intended to bring his will into force; and usually he will have this intention only when he writes the final signature. It has, therefore, been held on several occasions that, if the witnesses do not attest this operative signature, every page of the will is invalid—although they may have attested other signatures elsewhere in the will.[1] Moreover, although it is not usually necessary to fasten the component pages together,[2] this course is obviously desirable; and, indeed, if the signatures of testator and witnesses are relegated to a separate sheet some form of attachment appears to be essential.[3]

Attestation clause.

The testator's signature is usually followed by a formal attestation clause in which the witnesses declare that he signed (or acknowledged) "in the presence of us, present at the same time, who in his presence have subscribed our names as witnesses." Then follow the signatures of the witnesses. Admittedly, the final words of section 9 enact that no such formal clause is necessary; but its use has certain advantages, for it certifies that the will was executed and attested in the proper way, and, if omitted, probate is likely to be refused until proof is forthcoming (e.g. an affidavit by one of the witnesses) that the statutory formalities were in fact observed.

Alterations

Alterations.

If a testator desires to alter his will in some way after it has been executed, the alteration must itself be signed and attested in the manner already described. For this purpose he may either declare the desired alteration in a duly executed codicil, or alter the original will. If he adopts the latter alternative, he and his witnesses may sign in the margin of the will opposite the alteration in question, or at the foot or end of a memorandum written anywhere on the will and referring to the alteration.[1] But an alteration which is not so executed will be ineffective,[2] unless the will, as altered, is executed afresh or is confirmed by a subsequent will or codicil.[3]

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[1] *Phipps* v. *Hale* (1874), 3 P. & D. 166; *Leonard* v. *Leonard*, [1902] P. 243.

[2] *Lewis* v. *Lewis*, [1908] P. 1: a will written in Welsh.

[3] *Re Braddock* (1876), 1 P.D. 433; *Re Horsford* (1874), 3 P. & D. 211.

Strictly speaking, there is no need to execute any alterations or corrections which were inserted *before* the will was executed; for, although a Court of Probate presumes that alterations were inserted subsequently[4] (unless the will would be incomplete or defective without them[5]), they will be admitted to probate if evidence is available to show that they formed part of the will at the time of its execution.[6] It is usually advisable, however, to execute all alterations, irrespective of when they were made, in order to avoid the difficulty and expense of producing evidence on the point. Moreover, it is well to remember that the Court is likely to ignore pencilled alterations, if the will itself is written in ink; for, in the absence of evidence that they were intended to be final, they are treated as deliberative only.

Obliterations

Obliterations.

The foregoing rules are applicable to all kinds of alterations, including interlineations and obliterations. As regards *obliterations*, however, a further problem may arise. If an alteration is ineffective, for want of due execution, probate is given of the will as it stood before that alteration was made. But if a testator obliterates a portion of his will so successfully that the original passage is indecipherable, it is usually impossible to reinstate the deleted words; for the Court will not interfere physically with the will—e.g. by erasing the obliteration or by removing paper pasted over the words in question. Moreover, the Court will not allow extrinsic evidence (e.g. that of the solicitor who drafted the will) to solve the problem, unless the doctrine of "dependent relative revocation"[1] can be invoked. Consequently, probate is usually granted *in blank* in such a case, a space being left for the missing words; and the testator, by completely obliterating the passage in question, has in effect revoked it.[2]

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[1] Wills Act, 1837, s. 21.
[2] E.g. *Re Shearn* (1880), 50 L.J.P. 15.
[3] E.g. *Re Heath*, [1892] P. 253. As to *codicils* see *post*, p. 45.
[4] *Re Sykes* (1873), 3 P. & D. 26.
[5] *Re Birt* (1871), 2 P. & D. 214; *Re Adams* (1872), 2 P. & D. 367.
[6] E.g. *Re Jessop*, [1924] P. 221.

But if the obliterated passage can be read by any means short of physical interference with the document it will be admitted to probate. Thus, in *Ffinch* v. *Combe* (1894),[3] where a testator had pasted strips of paper over certain passages in his will, and probate had accordingly been granted in blank, an expert discovered some twenty years later that the original words were perfectly visible if held to the light and surrounded by a piece of cardboard. Probate was therefore granted afresh, to include the missing words.

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[1] See *post,* Ch. VI, pp. 70–71.

[2] See Wills Act, 1837, ss. 20 and 21, for the power to revoke passages by obliteration; also *Ffinch* v. *Combe,*] 1894] P., at p. 198. By section 20, the *destruction* of any part of a will, with intention to revoke the same, operates to revoke that part, if done either by the testator or by some other person in his presence and by his direction. Apparently the complete obliteration of a passage is a "destruction" of it for this purpose, and accordingly revokes that passage—unless the obliteration was effected in the testator's absence or without his authority. By section 21, an obliteration (or other alteration) not separately executed (*supra,* p. 40) is invalid and of no effect "except so far as the words or effect of the will before such alteration shall not be apparent." An unexecuted obliteration, therefore, revokes only such parts of the will as it renders completely indecipherable or meaningless. (As regards revocation by destruction, see also *post,* p. 67.)

[3] [1894] P. 191.

CHAPTER IV

THE NATURE OF A WILL

Ambulatory

Ambulatory.

We have already seen that a will, though executed with due formalities, has no effect at all until the testator dies.[1] This characteristic is usually described by saying that a will is *ambulatory* until the testator's death. If, therefore, a document executed as a will attempts to confer benefits which are to accrue *before* the testator's death, it is powerless to do so, unless, indeed, its execution included also the formalities prescribed for an *inter vivos* disposition. On the other hand, a deed which is not intended to have any effect until the death of the person who makes it is in truth an ambulatory instrument, and, consequently, it is ineffective unless it has been executed in the manner appropriate to a will.[2] Thus, it appears to follow that an instrument which includes both testamentary and immediate gifts may be effective for both purposes if both sets of formalities are observed; and in such a case only that part which is testamentary will be admitted to probate.[3] But composite documents are extremely undesirable, for a Court of Probate, in the course of its duty to decide whether (and what part of) an instrument is testamentary in character, may find in the immediate gifts an entire negation of that testamentary intent which is essential to a will. It is true that the Court is entitled to hear extrinsic evidence as to the intentions of the person who executed the instrument[4]—i.e. evidence other than that which an inspection of the document provides; but such evidence may not be available when the matter comes to Court, whereupon the wording of the document will be the only material upon which the case can be decided. Accordingly, although a testamentary instrument may escape the perils of litigation if it takes care to describe itself as a will, it is by no means essential that it should do so. Thus, such unlikely documents as deeds, cheques,[1] letters, and even instructions directing a solicitor to draft a will,[2] have been admitted to probate, on proof of their ambulatory character, due execution, and the necessary testamentary intentions.

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[1] *Supra*, pp. 3–4.

[2] *Re Morgan* (1866), 1 P. & D. 214.

[3] *Wolfe* v. *Wolfe*, [1902] 2 Ir. 246.

[4] *Re Slinn* (1890), 15 P.D. 156; *Nichols* v. *Nichols* (1814), 2 Phillim. 180: even to show that instruments apparently testamentary were not so intended.

Revocable

Revocable.

Another important characteristic of a testamentary disposition is that it is always *revocable* by the testator until he dies. Thus, if at any time he wishes to alter his will, or to cancel it, he is entitled to execute a further will or codicil which may either amend or add to the provisions of the earlier will or cancel it wholly or in part.[3] This power to revoke, though seldom expressed in a will, is inherent in every testamentary instrument, and cannot be excluded by any clause inserted therein, or by any undertaking which the testator may give to his proposed beneficiaries.[4]

Sometimes a power of revocation is inserted in an *inter vivos* disposition. But, as we have already seen, this does not convert the disposition into a will; for, unless an instrument is ambulatory, the interests which it confers are created immediately, even though they are future interests. Consequently, the instrument cannot be testamentary in character, since the fact that it may be revoked does not prevent it from coming into force at once.[5]

Can Appoint Executors

Can appoint executors.

We have already noticed a third characteristic peculiar to testamentary instruments—their ability to appoint an *executor* who, if he outlives the testator and is willing to accept office, will become the testator's representative. Maitland described this as the "hereditative" quality of a testament,[6] on account of the similarity in function of the Roman *haeres* to the modern executor. We have already seen that all the testator's property devolves in the first instance upon his personal representatives, except, of course, interests (e.g. for his life) which cease at his death.[1] Hence, a testamentary gift is not complete until the personal representatives have conveyed the property to the donee. This type of conveyance is known as an "*assent*," and although it may occur by word of mouth or even by conduct (e.g. where an executor allows a legatee to take possession of the legacy), assents to a devise of *land* now give no *legal* interest to a devisee unless made in *writing* duly signed by the personal representatives.[2] In order to avoid undue complication and delay, the legislature enacted in 1925 that no grant of probate or administration can now be made to more than *four* persons in respect of the same property.[3] Consequently, the only advantage to be gained by nominating more than four executors in a will is that if any of these executors die or refuse office there will be others available to fill the vacancy.

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[1] *Bartholomew* v. *Henley* (1820), 3 Phillim. 317.

[2] *Whyte* v. *Pollok* (1882), 7 App. Cas. 400.

[3] See *post*, Ch. V, *B* for effect of incapacity; Ch. VI, for revocation.

[4] Such an undertaking may, however, give rise to liability for damages for breach of contract, or may show that a trust has been created. See *post*, s.t. "*Mutual Wills.*"

[5] *Thompson* v. *Browne* (1835), 3 My. & K. 32; see also *supra*, pp. 2–3.

[6] Pollock and Maitland, II, 313.

Dispositions, Guardians, Conditions

Dispositions, Guardians, Conditions.

Although the chief functions of a will are to appoint executors and to provide for the distribution of the testator's property, it sometimes deals with other matters. Thus, it may effectively appoint guardians of the testator's infant children,[4] or contain directions as to their religious education. But, as a general rule, the law does not compel the observance of a testator's wishes, except insofar as they affect the destination of his property.[5] If, therefore, he desires to control a person's conduct—e.g. to prevent his widow from remarrying—his ends can usually be achieved only by making a gift to that person on *condition* that his wishes are observed; and, of course, he must make the gift sufficiently substantial to persuade the beneficiary that its value outweighs the attractions of the forbidden fruit. The rules applicable to such "conditions" are discussed in Chapter IX.

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[1] Administration of Estates Act, 1925, ss. 1, 3. Other interests deemed for this purpose to cease at his death include (*a*) property held *jointly* with some other person(s) at his death, and (*b*) *entailed interests* unless disposed of by his will under Law of Property Act, 1925, s. 176. These pass direct to the surviving joint tenant(s), and heirs of his body, respectively.

[2] Administration of Estates Act, 1925, s. 36 (4); reversing *Wise* v. *Whitburn*, [1924] 1 Ch. 460, where executors allowed a devisee to occupy the premises devised, and were held to have impliedly assented to the devise.

[3] Judicature Act, 1925, s. 160.

[4] Wills Act, 1837, s. 1; Wills (Soldiers and Sailors) Act, 1918, s. 4; Guardianship of Infants Act, 1925, s. 5.

[5] See *Foster* v. *Elsley* (1881), 19 Ch.D. 518. But if the will creates a valid *trust* of certain property, any person who accepts office as trustee is bound by the duties imposed by the trust; and an executor who takes out probate is deemed thereby to accept any trusts which the will imposes upon him. (*Mucklow* v. *Fuller* (1821), Jac. 198.)

Codicils

Codicils.

Strictly speaking, the word "will" embraces every valid testamentary instrument which a testator leaves at his death. In this sense, therefore, a testator can only leave one will, though its contents may be distributed among several documents. But current usage had adopted a different terminology; and it is customary to describe each testamentary document as a will, or, if in form a mere supplement to an earlier testamentary instrument, as a *codicil.* Each document, however, whether it be a will or a codicil, is subject to the same rules of law, and must, therefore, be executed in accordance with the formalities described in the previous chapter.

Incorporation of Existing Documents by Reference

Incorporation of existing documents by reference.

It is not invariably essential to set out full details of the testator's intentions in his will, for if it happens that his wishes coincide with the provisions of some other document, he is at liberty to incorporate that document (or part of it) by merely stating in the will that he desires to do so. Thus, a testator who wishes to settle property by will in the same way as he has already settled other property *inter vivos,* can do so by devising it to trustees to hold upon similar trusts to those which are contained in the former settlement. Thereupon the trusts of that settlement will be deemed to have been repeated in his will; and it is no objection that the incorporated document was not executed with the formalities prescribed by the Wills Act. When this course is adopted it is obviously desirable to describe the document in question accurately, in order to ensure that no doubts will arise as to its identity. It is also advisable to describe it in such a way as to show that it was actually in existence when the will was made; for the law does not allow a will to incorporate *future* documents—unless, of course, they are executed by the testator in the manner appropriate to a will. Were the rule otherwise, a testator could make a skeleton will declaring that he desires his property to devolve in accordance with the provisions of some informal document which he will make hereafter, and the result would be an entire negation of the rule that a testator must declare his testamentary intentions in the form prescribed by law.[1] Such a document will be effective, however, if the testator incorporates it by reference in a will or codicil of later date.[2]

E.g. Statutory Will Forms, 1925.

Undoubtedly, this doctrine of incorporation by reference, when properly employed, may greatly reduce the bulk and complexity of a will. This has been recognised recently by the legislature, which has provided testators with certain statutory forms containing various clauses which a testator may desire to incorporate in his will.[3] These are known as the *Statutory Will Forms*, 1925, and they are accompanied by instructions as to the words which a will should use in order to incorporate the clauses desired.[4]

Animus Testandi

Animus testandi.

No will is entitled to be admitted to probate unless the testator executed it with the intention that it should take effect as his will. Accordingly, one of the duties of the Court of Probate is to decide whether the necessary *animus testandi* existed in cases when the testator is alleged to have been insane at the time of making the will, or to have made it in consequence of some fraud, coercion, or mistake which shows that his mind did not go with his pen. These matters will receive more detailed treatment in a later chapter.[1] Somewhat similar considerations arise, however, when a testator states in his will that he does not intend it to take effect unless some specified condition occurs—e.g. unless he outlives his wife.[2] In such a case his testamentary intentions are conditional upon the happening of the specified event, and therefore probate will usually be refused unless that event has occurred. But the Court appears to be reluctant to construe a will as conditional, and may refuse to do so if evidence is available to show that the condition was not in fact intended to prevent the will from coming into operation.[3]

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[1] An exception exists in Secret Trusts (*post*, Ch. VIII, *B*), e.g. *Re Hawksley*, [1934] 1 Ch. 384: bequest to persons (on trust) "to carry out instructions that I may leave in writing or verbally which I have not fully completed"; but the details of the trust must be communicated before the testator dies. (*Re Boyes* (1884), 26 Ch.D. 531.)

[2] E.g. *Re Smart*, [1902] P. 238: bequest "to such of my friends as I may designate in a book . . . that will be found with my will." Will confirmed by codicil made after the "book" was written; but codicil contained no reference to the "book," hence bequest invalid. See also *University College of North Wales* v. *Taylor*, [1908] P. (C.A.) 140.

[3] These forms were issued by the Lord Chancellor, under the authority of Law of Property Act, 1925, s. 179. They are concerned chiefly with dispositions of personal estate and of real estate devised upon trust for sale.

[4] E.g. "All the forms contained in Part I of the Statutory Will Forms, 1925, are incorporated in my will." See also Law of Property Act, 1925, s. 130 (3), and *Re Jones*, [1934] 1 Ch. 315, for the statutory power to incorporate by reference trusts involving entailed interests.

Conditional wills.

Thus, in *Re Cawthron* (1863),[4] a will began "In the prospect of a long journey, should God not permit me to return to my home, I make this my last will." Although this suggested that the will was intended to be conditional upon the testator's death while away from home, the facts showed that whereas he gave instructions for its preparation when about to undertake a long journey he did not actually execute the will until he had returned. Probate was therefore granted, and the will was treated as unconditional.

A recital of some threatened calamity, such as possible death on a hazardous journey or military expedition, sometimes leaves it uncertain whether a will is intended to be conditional or not. But such a recital does not amount to a condition if it merely signifies the reason why the testator thought it advisable to make his will, hence in this case the will remains effective, although the testator survives the dangers which stimulated him to make it.[5]

Joint Wills

Although at one time it was said to be impossible to make a *joint will*,[6] it is now settled that this opinion was ill-founded.[7] It is, therefore, permissible to combine the

Joint wills.

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[1] Ch. V, *B*.
[2] E.g. *Re Da Silva* (1861), 2 Sw. & Tr. 315.
[3] *Re Spratt*, [1897] P. 28.
[4] 3 Sw. & Tr. 417.
[5] *Vines* v. *Vines*, [1910] P. 147.
[6] Per Lord Mansfield, *Darlington* v. *Pulteney* (1775), 1 Cowp. 260, 268.
[7] *Re Duddell*, [1932] 1 Ch. 585.

testamentary intentions of several persons in one document; whereupon this document is treated as the will of each testator. Each joint testator, of course, must execute the will with proper formalities, and is at liberty to revoke it so far as it applies to him; but, if he leaves it unrevoked, probate will be granted on his death of so much of it as represents his testamentary intentions.[1] This kind of will is somewhat rare, but it is occasionally adopted by husband and wife,[1] or by persons who have power to make a joint appointment by will.[2]

Mutual Wills

Mutual wills.

Sometimes, when testators desire to make provision for each other, each makes a separate will in the other's favour and in substantially identical terms. These are known as *mutual wills.* Thus, a husband and wife may decide to make mutual wills whereby each leaves everything to the other,[3] or to the other for life with remainder to some relative whom they wish to benefit.[4] Much of the advantage of such an arrangement will be lost, however, if a testator who has made a mutual will remains free to revoke it; consequently, persons who agree to make mutual wills usually undertake not to revoke them without the other's consent. Such an agreement, as we have already seen, cannot deprive a testator of the universal right to revoke his will;[5] but, if it amounts to a valid contract, his estate may be liable in damages should he revoke in breach of that contract.[6] Moreover, if two testators agree to make mutual wills in favour of each other for life with remainder to agreed persons, and contract not to revoke these wills, it would be inequitable to allow the surviving testator to benefit under the other's will, and then to revoke his own will in breach of his undertaking. In such a case, therefore, the survivor may be treated as a trustee of the property which he promised to bequeath in the manner arranged; and, consequently, it will devolve according to the agreement, whether he revokes his will or not.[1] But the Court will not compel him to be a trustee unless it is satisfied that this was intended;[2] and, of course, the mere fact that two testators have made mutual wills does not of itself show that they undertook not to revoke them.[3]

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[1] *Re Piazzi Smith,* [1898] P. 7; *Re Hagger,* [1930] 2 Ch. 190.

[2] *Re Duddell,* [1932] 1 Ch. 585.

[3] *Stone* v. *Hoskins,* [1905] P. 194; *Re Oldham,* [1925] 1 Ch. 75.

[4] *Dufour* v. *Pereira* (1769), 1 Dickens 419.

[5] A Court of Probate is therefore not concerned with agreements not to revoke; but they may justify proceedings in another court. See *Re Heys,* [1914] P. 192.

[6] *Synge* v. *Synge,* [1894] 1 Q.B. (C.A.) 466. But automatic revocation by marriage (*post,* Ch. VI) gives no right of action if it is a *first* marriage: *Robinson* v. *Ommanney* (1883), 23 Ch.D. 285.

Joint Mutual Wills

Joint mutual wills.

Sometimes mutual wills are combined in one joint will executed by both testators.[1] Here, again, the considerations discussed in the preceding paragraph apply with equal force; for a joint will has the same effect as if each testator had made a separate will.

Thus in *Re Hagger* (1930)[4] a husband and wife had carried on a successful business together for some years, and had always treated their savings as their common property. In 1902 they made a joint will which provided that on the death of whichever testator should die first the whole of this property should pass to trustees, upon trust for the survivor for life, and thereafter upon trust to sell the property and divide the proceeds among nine named persons. Moreover they agreed that neither of them should alter or revoke the will without the consent of the other. In 1904 Emma, the wife, died. Accordingly so much of the will as concerned her estate came into operation; that is to say, her unascertained share of their pooled resources became subject to the trusts specified by the will. John, the husband, died in 1924, having made a further will in 1921 which directed that *everything of which he was capable to dispose* should be held by trustees upon trust for certain other persons.

The question then arose whether this latter will operated upon the husband's share of their common property. Clauson, J., decided that it did not, and held that the *contract not to revoke* operated at the wife's death to convert the husband into a *trustee* of his share of the property upon trust to apply it in the manner prescribed by their joint will. Moreover the learned judge expressed the opinion that this trust would have arisen even if the husband had not accepted the life interest in his wife's share which the joint will had conferred upon him when she died.

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[1] *Dufour* v. *Pereira* (*supra*); *Re Hagger* (*supra*).

[2] *Re Oldham* (*supra*). Here each testator bequeathed an *absolute* interest to the other, with identical alternatives in case of lapse. This therefore showed that no trust was intended—per Astbury, J.

[3] *Gray* v. *Perpetual Trustee Co., Ltd.*, [1928] A.C. (P.C.) 391.

[4] [1930] 2 Ch. 190.

Probate may omit irrelevant passages.

Finally, it may be mentioned that a Court of Probate has power, when a will contains objectionable passages which have no dispositive effect, to order that they be omitted from the probate and from any copy issued by the probate registry. Since the will itself remains in official custody, such an order prevents the unnecessary dissemination of undesirable and irrelevant observations which a testator has inserted in his will. This course may be adopted where a will contains scandalous and defamatory statements,[1] or passages which are objectionable to the testator's family,[2] or the publication of which is contrary to public policy.[3]

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[1] *Re White*, [1914] P. 153.

[2] *Re Bowker*, [1932] P. 93.

[3] *Re Heywood*, [1916] P. 47. Here, on the application of the War Office, it appears that the words were also expunged from the will itself (a soldier's will), contrary to the general rule—cf. *Re Maxwell* (1929), 140 L.T. 471.

CHAPTER V

THE LIMITS OF THE POWER OF TESTATION

In modern times the power of testation is much wider than it has been in the past. Indeed, it would be very nearly accurate to assert that English law to-day allows everyone full power to dispose of all or any of his property by will in favour of any person or object he desires to benefit. There are, however, several important exceptions to this proposition: for certain interests in property cannot be transferred by will; some persons are unable to make a valid will; and some persons and objects cannot take a benefit under a will.

A. WHAT PROPERTY CAN BE DEVISED OR BEQUEATHED

Wills Act, 1837, s. 3.

Section 3 of the Wills Act, 1837, provides the general rule that a will may dispose of all interests in property to which the testator is entitled at his death, including even future and contingent interests.[1] This is subject, however, to the rule which we have already mentioned, whereby the property devolves in the first place upon his personal representatives.[2]

Life interests

Joint interests.

Naturally, a testator's will cannot affect any property in which he has an interest which ends at his death. Hence, his *life interests* die with him, unless they are interests *pur autre vie* held for the lifetime of some person who is yet alive. Similarly, his *joint interests* (though not his interests in common) end with his death, unless he outlives his fellow joint-owners; for the leading characteristic of joint-ownership is the "right of survivorship," whereby on the death of one joint-owner his interest accrues to the survivors.[3]

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[1] Law of Property Act, 1925, s. 178, removes a suspicion based upon the Wills Act, 1837, s. 3, that an exception existed if the testator left no heir or next of kin.

[2] *Supra,* pp. 5–7, 43–44.

[3] Hence if several persons hold property jointly, on trust for themselves in common, when one dies his legal interest, being joint, accrues to the survivors; but his equitable interest in common (to which the right of survivorship is inapplicable) passes via his personal representatives, after payment of his debts, to the appropriate legatee, if any, specified in his

Trust property.

Again, since trustees of property invariably hold it jointly, *trust property* devolves upon the surviving trustees when one of their number dies. And, as one might expect, even a sole trustee (or the sole survivor of several co-trustees) is not allowed to devise his trust; on his death the trust property and the powers conferred by the trust pass to his personal representatives, and remain with them until new trustees have been appointed to take their place.[1] Thus, a sole trustee of property (or the sole survivor of several co-trustees) may be said to have the power, by virtue of his ability to appoint executors of his will, to decide upon whom the trust property will devolve when he dies—pending the appointment of new trustees.[2]

Powers of Appointment

Powers of appointment:

As a rule, a testator's will cannot dispose of any property or interest which is not his to give.[3] But settlements of property, instead of specifying the persons who are to benefit by it or the interests which they are to take, frequently prefer to empower someone to make the selection in subsequent years when, perhaps, the needs of the various beneficiaries will have become apparent. A person having such a power is said to have a *power of appointment* over the property in question; and the settlement may either empower him to make the appointment by deed, or empower

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will, or to the persons entitled on intestacy. This combination of the two forms of co-ownership frequently arises in the case of partnership land—see *Re Fuller's Contract,* [1933] Ch. 652; and when land is conveyed to persons in common—see Law of Property Act, 1925, s. 34, and *post,* Ch. VIII, *A*.

[1] See Trustee Act, 1925, ss. 18, 33.

[2] When *land* is settled otherwise than on trust for sale, the legal estate is held by the tenant for life (if of full age) upon trust for all the persons beneficially interested therein. In fact, therefore, he is the sole trustee of that *land.* As a rule, however, there are also "trustees of the *settlement,*" whose function is, *inter alia,* to supervise him in the exercise of his powers. In such a case, on the death of the tenant for life, he is *deemed to have appointed* the trustees of the settlement as his "special executors" in regard to the settled land (Administration of Estates Act, 1925, s. 22). Accordingly the settled land will not pass with his other property to his general executors unless (i) there are no trustees of the settlement, or (ii) the settlement ceases at his death—*Re Bridgett and Hayes,* [1928] Ch. 163. Similarly, if the tenant for life dies intestate, the court may grant administration of the settled land to the trustees of the settlement as special personal representatives: Judicature Act, 1925, s. 162.

[3] Of course, he may endeavour by his will to persuade the owner of that property to give it to a person whom he desires to have it. As to this see the Equitable doctrine of "Election," *post,* Ch. VIII, *C.*

him to appoint by his will, or leave him free to appoint by either method. It will thus be seen that a testator who has a testamentary power of appointment over property is competent to dispose of that property although, in fact, it does not belong to him. If the power is wide enough to enable him to appoint any person whatever, it is known as a *general power of appointment*; and such a power is so nearly akin to ownership that even a clause in the appointer's will disposing of "all my property" is capable of including the property to which that power relates.[1] If, however, the testator holds a power of appointment which restricts his selection to a specified class of objects—e.g. a power to appoint among the children of X—this is known as a *special power of appointment*; and in order to exercise a power of this nature his will must show a clear intention of doing so—e.g. by referring expressly to the property or to the power of appointment.[2]

(*a*) General

(*b*) Special.

Entailed Interests

Entailed interests.

An *entailed interest* does not necessarily come to an end on the death of the person to whom it belongs; for, as we have seen, it devolves upon the heirs of his body if he leaves descendants capable of inheriting. Nevertheless, as a general rule, he cannot dispose of it by his will, and so disinherit the heirs of his body by devising it to some other person. Section 176 of the Law of Property Act, 1925, however, provides an exception to the rule: a will made or confirmed by an adult tenant in tail *after* 1925 can now dispose of the entailed property, provided that his entailed interest is not a mere remainder or future interest.[3] But the section stipulates that the will must refer "specifically either to the property or to the instrument under which it was acquired or to entailed property generally": this ensures that the testator will not unwittingly disinherit the heirs of his body by using

Law of Property Act, s. 176.

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[1] Wills Act, 1837, s. 27; *post*, pp. 174–177.

[2] E.g. *Re Ackerley*, [1913] 1 Ch. 510. As regards a "power in the nature of a trust" see *post*, p. 168.

[3] Such a "tenant in tail in possession of full age" has power to "bar the entail" at any time *inter vivos*, by merely executing a disentailing deed: Fines and Recoveries Act, 1833, s. 15; Law of Property Act, 1925, s. 130. This would give him a fee simple or absolute interest, which is freely devisable. But s. 176 enables him to dispose of the entailed property by will although he has not barred the entail.

general expressions in his will—such as "all my property to X." Moreover, the section provides that the heirs of his body are disinherited only insofar as his will effectively disposes of the property;[1] if, therefore, a tenant in tail of Blackacre devises Blackacre simply "to X *for life*," the entailed interest is merely postponed until X's death; whereas, if it were an unrestricted devise "to X" the entail would be destroyed completely, and X would acquire the entire fee simple.[2]

Personal representatives.

Finally, it must be remembered that the interests of a person which cease at his death cannot pass to his personal representatives when he dies.[3] Thus, neither *joint* interests nor *life* interests (except *pur autre vie*) devolve upon personal representatives.[4] Moreover, an *entailed interest* is deemed to cease for this purpose upon the death of the tenant in tail, unless he disposed of the property by his will in the manner described in the preceding paragraph. But the property will devolve upon his personal representatives if his will disposes of it; and this rule applies also to any property over which he had a *general power of appointment*.[5] Such property is, therefore, available in their hands for the payment of his debts.[6]

B. CAPACITY TO MAKE A WILL

Married women.

Infants and persons of unsound mind are unable, as a rule, to make a valid will. At one time married women were under a somewhat similar disability, chiefly because on marriage the husband automatically acquired rights over her property. The Married Women's Property Act, 1882,[7] however, has removed this anomaly. Consequently, the will of a married woman can freely dispose of any property acquired by her since the passing of this Act, and even of property acquired before the Act if the marriage occurred after 1882.[1]

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[1] Sub-sec. (1): . . ."subject to and in default of any such disposition by will, such property shall devolve in the same manner as if this section had not been passed."

[2] S. 176 applies also to a testator who, having barred the entail imperfectly while a remainderman, thus acquiring a "base fee," is now entitled in possession. But it does not apply to a tenant in tail who is restrained by statute from barring the entail—e.g. a tenant in tail after possibility of issue extinct. Sub-secs. 2, 3.

[3] Administration of Estates Act, 1925, ss. 1, 3. For this purpose property vested in a *corporation sole* (e.g. a bishop and his successors) is deemed to give each holder an interest which ceases at his death. See also Law of Property Act, 1925, s. 180 (1).

[4] *Supra*, p. 51.

[5] Administration of Estates Act, 1925, s. 3 (2) and (3).

[6] *Ibid*., s. 32 (1).

[7] SS. 1 (1), 2, 4, 5; also Married Women's Property Act, 1893, s. 3.

Infants.

Persons under 21 years of age are unable to make an effective will in ordinary circumstances.[2] Therefore a will made during infancy is invalid unless the testator, after reaching full age, re-executes it or makes a new will or codicil which expressly confirms it. We have already seen, however, that an exception exists in favour of infant soldiers in actual military service or seamen at sea,[3] and that even a nuncupative or informal will is effective in such cases. Moreover, the Wills (Soldiers and Sailors) Act, 1918, states that these privileges apply to devises of realty, as well as to bequests of personalty.[4] Nevertheless, so far as an *infant* soldier or sailor is concerned, it appears that his ability to devise real property is severely curtailed by the Property Acts of 1925. In the first place, no infant can now hold a *legal* estate in land;[5] but this is not a serious factor here, for an infant is still competent to hold equitable interests (the land being held by trustees upon trust for him), and can, therefore, devise them if these statutes do not stand in his way. Secondly, no infant can dispose of his entailed interests by will (under section 176 of the Law of Property Act, 1925). And, finally, the Administration of Estates Act, 1925, section 51 (3), has enacted that any infant who dies *unmarried* after 1925 entitled to a fee simple interest in land "shall be deemed to have had an entailed interest."[6] Hence, since he cannot devise entailed property, it follows that an infant cannot devise a fee simple interest, even if he is a soldier or sailor, unless he marries or attains full age before he dies.

Soldiers and sailors.

Persons of unsound mind.

Persons of unsound mind are incapacitated from making a valid will. This does not mean, however, that every lunatic is bound to die intestate; for he may have made a valid will before his mind became afflicted, or during a lucid interval.[1] Subsequent insanity does not invalidate wills already made;[2] its effect is merely to prevent a person from making a will whilst his mind is deranged.

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[1] Or if the property was vested in trustees for her separate use.

[2] Wills Act, 1837, s. 7.

[3] *Supra*, p. 34; Wills Act, 1837, s. 11; Wills (Soldiers and Sailors) Act, 1918, s. 1.

[4] S. 3.

[5] Law of Property Act, 1925, s. 1 (6).

[6] *Re Taylor*, [1931] 2 Ch. 242. The sub-section appears to exclude realty held by *trustees for sale* on his behalf. Moreover, leaseholds and other personalty are excluded (*semble*) unless held by trustees upon trust to devolve with or as freehold land.

If a will is contested on grounds of alleged mental incapacity, the executors who attempt to obtain probate of it must prove that the testator's mind was sufficiently clear when he made it to allow him to comprehend what he was doing, to know what property he had, and to remember the persons (such as wife and children) whom he would be likely to desire to benefit. Thus, the burden of proving testamentary capacity is upon the executors who propound the will. The fact, however, that a testator was subject to *delusions* is not necessarily fatal; for if they leave his general power of understanding unimpaired, and are directed solely towards matters which have no relation to his property or the persons he is likely to wish to benefit, they cannot be said to destroy his ability to make a valid will.[3]

Coercion mistake, etc.

In passing, it may be mentioned that when the mind of a testator is over-borne by pressure exerted by another person (e.g. undue influence or coercion), or is misled by some fraud, accident, or mistake, such evidence may convince a Court of Probate that part of his will (or the whole of it) does not represent his true testamentary intentions. Thereupon, probate will be refused as to the part affected, although there was no trace of mental infirmity in the testator when he made the will. Apparently, however, a will cannot be attacked merely on grounds of *accident* or *mistake* if the testator was aware of its contents when he executed it;[4] it is therefore advisable to make sure that he reads or hears the whole of it before he appends his signature.

C. WHO MAY BENEFIT UNDER A WILL

Persons.

Neither infancy nor mental infirmity precludes a person from receiving benefits under a will. Indeed, an object which has no mind whatever (e.g. a charity) is, nevertheless, capable of taking the benefit of a devise or bequest; for, although some practical difficulty may arise from the rule that property can be held only by a *person* (whether human or a corporation), this difficulty can be solved by leaving the property to trustees upon trust for the object in question. Trusts of this kind are sometimes known as "purpose trusts"; and if the purpose in question is recognised by law as a *charitable purpose*,[1] it is the business of the Attorney-General to sue the trustees if they fail to devote the property to the charity concerned. But if the purpose is "non-charitable" in the legal sense—e.g. a trust to maintain the testator's horses and hounds[2]—no one is competent to enforce it against the trustees;[2 5] in such cases, therefore, testators commonly adopt another device to achieve their ends—a substantial bequest is made to some person or charity with a proviso that if the testator's non-charitable purpose is not fulfilled the fund shall pass to some other person or charity. The former person or charity is, therefore, likely to observe the testator's wishes, since disobedience will lead to the loss of a substantial benefit.[4]

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[1] *Re Walker* (1912), 28 T.L.R. 466.

[2] But the Court has wide powers to direct a settlement to be made of a lunatic's property, and thus may over-ride testamentary dispositions which he made when sane. Law of Property Act, 1925, s. 171 (1) (*c*).

[3] *Re Walker* (*supra*). For fuller treatment of this topic, see Jarman on *Wills*, and Theobald on *Wills*.

[4] *Collins* v. *Elstone*, [1893] P. 1. Testatrix was innocently misinformed as to the effect of a revocation clause. *Held*: it stands, for she knew it was in the will. See also *Fulton* v. *Andrew* (1875), L.R. 7 H.L. 448: the rule appears to be the same whether the mistake is of law or of fact.

Purposes, charitable and non-charitable.

Felons

Felons

Since 1870, when the Forfeiture Act enacted that a conviction of felony no longer leads to forfeiture of the felon's property to the Crown, the fact that a person has been convicted of a criminal offence does not prevent him from taking a benefit under a will. On considerations of public policy, however, the Courts have decided that no person guilty of murder or manslaughter can take any benefit through the will or intestacy of his victims,[5] unless he was insane when he killed the deceased.[6]

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[1] *Commissioners of Income Tax* v. *Pemsel*, [1891] A.C. 531; See Keeton, *Law of Trusts*, Ch. VIII.

[2] *Re Dean* (1889), 41 Ch.D. 552.

[3] Keeton, *op. cit.*, Ch. VII, *C*.

[4] If the divesting condition may operate at a remote period charities are chosen as legatees, in order to evade the rules against remoteness. See *post*, Ch. X, *C* and *D*; *Re Tyler*, [1891] 3 Ch. 252; *Re Chardon*, [1928] Ch. 464.

[5] *Re Crippen*, [1911] P. 108; *Re Hall*, [1914] P. 1; *Re Sigsworth*, [1934] W.N. 187.

[6] *Re Houghton*, [1915] 2 Ch. 173; *Re Pitts*, [1931] 1 Ch. 546.

Witnesses

Witnesses and their spouses.

As we have already seen,[1] a person who attests a will as a witness is usually disqualified thereby from claiming any benefit under that will, and the husband or wife of an attesting witness is disqualified also.[2] But a beneficiary who marries a witness *after* the will has been executed is not prejudiced thereby.[3] Nor is a non-beneficial clause, such as the appointment of a trustee or executor, invalidated if the person named therein attests the will.[4] Moreover, if a testator makes a will and subsequently executes a codicil confirming it, a person upon whom the will confers a benefit is not disqualified merely through attesting *one* of the documents; for this does not preclude him from claiming through the document which he did not attest.[5]

Superfluous witnesses.

A person who signs as a witness is usually incompetent to benefit from the will or codicil which he attested, although there were two other witnesses to the document, so that his signature was in a sense superfluous.[6] But the Court of Probate has power to exclude from probate the signature of a person who signed without any intention of attesting; and thereupon he becomes entitled to claim any benefit given him by the will, although in fact he had signed his name upon it.[7] Furthermore, it has been decided that section 15 of the Act of 1837 has no application to the informal wills permitted to soldiers and sailors; for the purpose of section 15 is merely to ensure that, when witnesses are required by law, their testimony shall be free from bias, and, as we have seen, such wills need no attestation.[8]

Persons instrumental in preparing or obtaining a will.

Similarly it should be observed that the Act imposes no disqualification upon persons who, though not attesting witnesses, were instrumental in preparing the will or in persuading the testator to make it. Nevertheless the courts regard a will with suspicion if it confers a benefit on such a person: for cases of this kind are liable to be associated with undue influence or fraud. Consequently probate may be refused (either wholly or as regards those parts of the will which benefit him) unless this suspicion is removed.[1]

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[1] *Supra*, p. 38.

[2] Wills Act, 1837, s. 15. But this does not affect a charge or direction as to the payment of debts owed to a witness or to the spouse of a witness —*ibid.*, and s. 16.

[3] *Thorpe* v. *Bestwick* (1881), 6 Q.B.D. 311.

[4] SS. 15, 17.

[5] *Re Pooley* (1888), 40 Ch.D. 1; *Re Trotter*, [1899] 1 Ch. 764. *Aliter* if he attests *both* documents: *Re Marcus* (1887), 57 L.T. 399.

[6] *Randfield* v. *Randfield* (1863), 32 L.J. Ch. 668.

[7] *Re Sharman* (1869), 1 P. & D. 661; *Re Smith* (1889), 15 P.D. 2.

[8] *Re Limond*, [1915] 2 Ch. 240: soldier's will, attested by two brother officers, in favour of one of them, held valid.

Executors

Executors:

The fact that a legatee or devisee is appointed executor of the will does not invalidate the gift to him. But the Court construes a legacy (though *semble* not a devise of realty) to an executor as conditional upon his accepting office, unless the will shows a contrary intention. If, however, the will expresses some motive for the gift other than recompensing him for his trouble, this may show a contrary intention sufficient for the purpose—e.g. "to my *friend* and executor A. B., I bequeath £100."[2] Moreover, the presumption does not arise in the case of a residuary bequest.[3] It is a sufficient acceptance of office if the executor proves his will or begins to administer the estate. Thereupon the condition is satisfied, and even if he dies before completing his duties his legacy stands.[4]

(i) Legacy conditional on accepting office.

At one time executors were automatically entitled to all personalty of which the will failed to dispose. By the Executors Act, 1830, however, they became trustees of it for the persons entitled on intestacy; though if the deceased left no next of kin and showed no contrary intention by his will they took it as before. Since 1925 they have been entirely excluded; for, in default of persons entitled under the intestacy rules, they must now hold the undisposed of property upon trust for the Crown—unless the will shows that they are intended to take it beneficially.[5] And where a will bequeaths the property to them expressly as *trustees* this has always been the rule.

(ii) Have now no right to take undisposed of personalty (Administration of Estates Act, s. 49).

Lapse

Lapse.

A legatee or devisee who outlives the testator is entitled to the legacy or devise even if he dies before the executors distribute the property; for his personal representatives receive the gift on behalf of his estate. On the other hand, no person who died before the testator can ordinarily require any benefit under the testator's will, since he is non-existent when the will takes effect. Thus, a legacy or devise to X is said to *lapse* if X predecease the testator; and, generally speaking, neither the fact that X left children who outlive the testator nor the use of phrases such as "to X his executors, administrators, and assigns" is effective to preserve the gift from destruction.[1] Occasionally, however, the Courts have decided that a legacy bequeathed in order to fulfil some legal or moral obligation (e.g. to pay a statute-barred debt, or the unpaid balance of a debt from which the testator obtained his discharge in bankruptcy) is valid, although the legatee dies before the testator.[2] Moreover, if the will shows an intention to prevent the legacy from lapsing, and clearly shows that the legatee's estate is to benefit if he predecease the testator, the legatee's personal representatives are entitled to claim the legacy in his stead.[3] But a mere declaration in the will that a legacy is not to lapse, or that the will is to take effect even if the testator outlives the legatee, is not of itself sufficient.[4] If, therefore, a testator desires to ensure that a legacy or devise will not be abortive in these cases, the wisest plan is to frame it as a substitutional gift, stating expressly who is to take the benefit in the event of lapse—e.g. "To A, but if he die before me to his children."

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[1] *Fulton* v. *Andrew* (1875), L.R. 7 H.L. 448

[2] *Re Denby* (1861), 3 De G. F. & J. 350; *Bubb* v. *Yelverton* (1871), 13 Eq. 131.

[3] *Christian* v. *Devereux* (1841), 12 Sim. 264.

[4] *Re Appleton* (1885), 29 Ch. D. 893, (C.A.).

[5] Administration of Estates Act, 1925, s. 49.

Statutory exceptions:

(i) Entailed interests (s. 32).

When a testator desires the provisions of his will to take effect even if the named beneficiaries die before him, his intention is usually to benefit their children. If the gift is an entailed interest, such is almost certainly his intention, for this interest exists for the very purpose of benefiting a donee *and the heirs of his body*. Section 32 of the Wills Act, 1837, therefore enacts that a devise of realty to X for an *entailed interest* does not lapse if X dies before the testator, provided that X leaves descendants capable of inheriting who outlive the testator.[1] This rule now extends to similar bequests of personalty also.[2]

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[1] *Elliott* v. *Davenport* (1705), 1 P. Wms. 83.

[2] *Stevens* v. *King*, [1904] 2 Ch. 30; *Turner* v. *Martin* (1857), 7 D.M. & G. 429.

[3] *Sibley* v. *Cook* (1747), 3 Atk. 572.

[4] *Re Ladd*, [1932] 2 Ch. 219: a power of appointment exercised by testatrix in favour of her deceased husband.

(ii) Gifts to testator's issue (s. 33).

Furthermore, a testator who leaves property to his own descendants is particularly likely to desire that their children will benefit in their stead if they predecease him. Accordingly, section 33 of the Act provides that a devise or bequest to a *child or other issue of the testator* does not lapse if the devisee or legatee himself leaves issue who outlive the testator. As one might expect, however, this section does not preserve a gift which is bound to end at the donee's death (e.g. to him for his *life*, or *jointly* with other persons who survive him). Nor, as a rule, does it apply to a *class gift*—e.g. "to my children in equal shares"; for a testator who bequeaths an immediate legacy to a class of persons is usually taken to mean only persons who belong to that class at the date of his death;[3] consequently, this is not actually a case of the lapse of a legacy, but rather a case where no legacy is designated for the deceased child. This strict construction is not adopted, however, if the will shows a contrary intention. Moreover, if a testator has only four children at the date of his will and includes therein a bequest "to my *four* children in equal shares," the bequest identifies the actual individuals who are intended to benefit, as clearly as if each was mentioned by name. Consequently, if one dies before the testator, leaving issue who outlive the testator, section 33 will prevent the lapse of his share of the legacy.[4] Furthermore, it is established that the section does not apply to a *special* power of appointment exercised by the will in favour of a child or other issue of the testator; accordingly, if the testator outlives the child appointed the appointment to him will lapse.[5]

Contrary intention.

Neither section 32 nor section 33 operates to prevent lapse if the will shows that the testator intended the legacy of a deceased legatee to fail.

Thus in *Re Meredith* (1924),[6] a will contained a legacy for the testator's son. The son died leaving children. Thereupon the testator made a codicil declaring that, as the legacy to his son had lapsed, he now bequeathed a legacy to each of that son's children. *Held:* the codicil showed an intention to allow the original legacy to lapse; hence s. 33 did not operate to preserve it.

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[1] E.g. a devise "to X and the heirs *male* of his body" (or "in tail *male*") would lapse if X died before the testator leaving daughters only. So would a devise in tail female if only sons survived him.

[2] Law of Property Act, 1925, s. 130 (1).

[3] *Viner* v. *Francis* (1789), 2 Cox. 190. See *post,* Ch. X, *D* for the rules by which the members of a class are ascertained.

[4] *Re Bentley,* [1914] W.N. 88; 110 L.T. 623.

[5] *Holyland* v. *Lewin* (1884), 26 Ch.D. 266. *Aliter* a general power of appointment. *Eccles* v. *Cheyne* (1856), 2 K. & J. 676.

[6] [1924] 2 Ch. 552.

Neither section necessarily benefits the donee's issue.

A peculiar feature of sections 32 and 33 is that each section, after stating that no lapse shall occur if the deceased legatee or devisee leaves issue who outlives the testator, proceeds to enact, not that his issue shall take the gift in his stead, but that the gift "shall take effect as if the death of such person had happened immediately after the death of the testator." From this it follows that, although these sections take effect only when a deceased legatee leaves issue, the issue in question do not necessarily obtain any advantage when the sections apply. Suppose, for example, that A's father has made a will bequeathing him £1000, that A's uncle has made a will devising land to A in tail, and that A himself now makes a will disposing of "all my property (including entailed property) to my friend John Smith." A then dies, leaving a son, his only child, and A's father and uncle die a few weeks later. The fact that A's son survives protects both the bequest to A (section 33), and the devise of the entailed interest to A (section 32). Nevertheless, the son has no claim to either; for the sections provide merely that A must be treated as having died immediately after his father and uncle. Hence, the £1000 and the entailed interest must be treated as though they belonged to A when he died; he was, therefore, competent to dispose of them by his will, and they are liable in the hands of his executors for the payment of his debts.[1] Had A died intestate, both properties would have passed to his son (though even here the £1000 would be liable for his debts, and both properties for death duty in respect of A's death[2]). But since he left a will which was sufficiently wide to include both properties,[52] they devolve upon John Smith (assuming that he outlives the testator) to the exclusion of A's son.

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[1] Administration of Estates Act, 1925, ss. 1, 3, 32. If an undischarged bankrupt, A's trustee in bankruptcy might claim the money: *Re Pearson*, [1920] 1 Ch. 247.

[2] See *Re Scott*, [1901] 1 K.B. (C.A.) 228. See also p. 63, note 4, *post*.

[3] The words "including entailed property" appear to be sufficient to comply with Law of Property Act, 1925, s. 176, assuming that the will was made or confirmed after 1925.

Re Hensler (1881)[1] provides another instructive example of the effect of s. 33. Here a son died before his father, having devised all his property to the father. The father then died, having devised a house to the son. The son had left issue who outlived the father. Who became entitled to the house? The devise to the son did not lapse, for s. 33 applied. Hence his will was competent to dispose of the house. But, since s. 33 compelled the Court to treat the son as having died immediately *after* the father, the devise to the father lapsed (so far as the house was concerned). The son therefore had made no effective disposition of the house; consequently it passed to the persons entitled on his intestacy; and, as he died before 1926, the house devolved upon his *heir* according to the old rules of inheritance.[2]

Commorientes.

When dealing with questions of lapse it is essential to know whether the testator died before or after the persons to whom he devised or bequeathed his property. If no evidence is available on this point (e.g. if testator and legatee are found dead in the *débris* of a railway accident) there was formerly no legal solution of the mystery.[3] It is true that a presumption exists that persons who have been absent, unheard of, for seven years are dead; but there was no presumption as to when they died, or as to which of them died first. This difficulty has been removed, however, by the Law of Property Act, 1925, section 184. It enacts that henceforth (subject to any order of the Court) such persons are to be presumed to have died in order of seniority, insofar as questions of title to property are concerned.[4]

Law of Property Act, s. 184.

Lapsed gifts fall into residue.

Finally, it should be noted that wills commonly conclude with a residuary gift—e.g. "I devise and bequeath all the residue of my property to X." Unless a contrary intention is shown, such a residuary gift includes all property of the testator which has not been effectively disposed of by the other clauses in his will. It therefore covers not only property which he has made no attempt to devise or bequeath specifically, but also any property comprised in an attempted devise or bequest which has failed (e.g. by lapse, as above).[5] Sometimes the testator devises his residuary realty in a manner distinct from his residuary personalty; whereupon the resulting "residuary devise" and "residuary bequest" are subject to similar rules. If, however, there is no residuary gift, such property is undisposed of; it will, therefore, devolve upon the persons entitled by the intestacy rules. A like result occurs also if a residuary gift itself fails—e.g. by lapse. Thus, where a will directs that the residue be equally divided between the testator's nephews X and Y, the persons entitled on intestacy will take the whole of the residue if both X and Y die before the testator; but if X dies before the testator and Y outlives him, only X's share will devolve as on intestacy, for only his share of the residue lapsed.[1]

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[1] 19 Ch.D. 612.

[2] *Quaere* whether this would have been the case if his *father* had died after 1925; for by s. 33 the son is deemed to have died after the father.

[3] *Wing* v. *Angrave* (1860), 8 H.L.C. 183; *Re Nightingale* (1927), 64 L.J. 34, 71 S.J. 542.

[4] When this presumption applies it will usually enable the Crown to exact death duties twice in respect of the property concerned. The abovementioned exceptions to the law of lapse have this effect also.

[5] Wills Act, 1837, s. 28.

Except lapsed gifts of residue—intestacy.

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[1] See *post,* Ch. XIII, *A*, for the property comprised in a residuary gift.

CHAPTER VI

REVOCATION AND REVIVAL

Revocation by Subsequent Will or Codicil

Revocation by subsequent will or codicil:

IF a person who has made a will or codicil desires to cancel it, wholly or in part, perhaps the most satisfactory of the several available methods is to declare his wishes in a subsequent testamentary instrument duly executed by him. The formalities required of such an instrument are precisely the same as those required for an ordinary will or codicil.[1] Indeed, since a testator who revokes his will commonly intends to make other devises or bequests in its place, the revoking instrument is usually a will or codicil and itself makes dispositions of his property.

(Soldiers and sailors.)

As one might expect, a soldier or sailor who is entitled to make an informal will (*supra* Chapter III) is entitled also to revoke a previous will by making an informal declaration. But when he ceases to enjoy this privilege (e.g. a soldier who has returned to civilian life) the normal formalities must be observed, whether or not these formalities were applicable to the will which he desired to revoke. For similar reasons, an *infant* soldier or sailor who exercises his privilege of making a will and then returns to civilian life, will be unable to revoke it until he comes of age; for he has lost thereby the right to make a will while under age.[2]

(i) Express revocation.

An example of an *express* clause of revocation is to be found in the words with which the majority of wills commence: "I, John Smith, hereby revoke all wills and testamentary instruments already made by me, and declare this to be my last will and testament." Such a clause has some practical utility even when the testator has made no previous will; for it removes any doubts on the matter, by showing those who administer his estate that even if some earlier will is discovered it is inoperative. A revocation clause need not be so sweeping as this, however. Thus, it may be so expressed as to revoke only one or some of the provisions which appear in a previous will or codicil; and in such a case the remaining provisions are unaffected. Nor is technical language required, so long as the document shows a clear intention to revoke; yet the mere fact that a document describes itself as "the *last* will and testament" of the testator does not sufficiently show an intention to revoke former wills.[1]

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[1] Wills Act, 1837, s. 20.

[2] But *semble* it is automatically revoked by his *marriage* under the rules given hereafter.

(ii) Implied revocation.

A testamentary instrument, duly executed, automatically revokes such provisions of former wills and codicils as are *inconsistent* with it. In such cases the revocation is said to be "implied"; for although the instrument is clearly intended to revoke the former dispositions it does not say so in express words. Thus, if a testator, who has already made a will devising all his real property to A and his personalty to B, makes a second will (or a codicil) which devises all his realty to Z, the devise to A (though not the bequest to B) is thereby revoked, and Z is now entitled to the testator's real estate. If, however, the devise to Z is invalid, the previous devise to A stands.

Thus in *Re Robinson* (1930)[2] the testatrix, by a codicil to her will, devised and bequeathed everything to X. But X's wife attested this codicil. The gift to X was therefore invalid,[3] and consequently the will was not revoked. If the codicil had contained an *express* clause of revocation the will would have been revoked; for, as we have seen, the effect when a legatee or his wife attests a will or codicil is merely to invalidate his legacy—not to invalidate the document entirely.[4] Moreover, had the codicil been attested by independent witnesses it would have revoked all the dispositions contained in the will; for a valid gift of all the testator's property is necessarily inconsistent with all previous dispositions.[5]

Again, in *Re Beech* (1923),[6] it was decided that an instrument made without testamentary intentions cannot thus revoke an existing will. Consequently a soldier on active service in France who wrote letters to his son stating that he had already made a will containing certain provisions, which in fact it did not contain, did not thereby revoke the will in question.

(Codicils.)

In this connection, moreover, it should be observed that whenever a will is followed by *codicils* the Court construes the codicils so as to interfere with the will as little as possible.[1]

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[1] *Re Hawksley's Settlement*, [1934] 1 Ch. 384, and cases there cited.

[2] [1930] 2 Ch. 332.

[3] Wills Act, 1837, s. 15.

[4] *Supra*, p. 58.

[5] Except of property appointed under a special power, and (after 1925) entailed property (*semble*).

[6] [1923] P. 46 (C.A.).

Thus, in *Re Davies* (1928),[2] a testator by his will bequeathed "all my farms in the parish of Bedwas" to X. Two years later he made a codicil devising one of his farms there to his daughter for life with remainder to his grandson in tail. The grandson never barred the entail, and died some ten years after the testator, leaving no heirs of his body. The entail accordingly failed. The codicil, therefore, had not completely disposed of this farm. Astbury, J., decided that on the death of the testator's daughter, the farm passed to X, by virtue of the original will; for the will and codicil must be read together, and the will prevails except insofar as the codicil effectively excludes it.

Revocation by Destruction

Revocation by destruction.

Section 20 of the Wills Act, 1837, which governs questions of revocation, provides also a further method by which a will or codicil can be revoked, viz. "by the burning, tearing, or otherwise destroying the same by the testator, or by some other person in his presence and by his direction, with the intention of revoking the same."[3] The words of the section show that a testator who elects to revoke his will by this method must either "burn, tear, or otherwise destroy" it himself, or order some other person to do so and be present when it is done. Hence, a will which is burnt at the testator's request, but not in his presence, remains valid; and a copy of it will be admitted to probate.[4]

In *Cheese* v. *Lovejoy* (1877),[5] the testator drew a line through his will and wrote upon it "This is revoked." He then threw it among a heap of papers which he intended to be destroyed. A servant found it and preserved it. It was admitted to probate after his death. He had not destroyed it, nor were the words of revocation signed and attested; and a mere intention to revoke is not sufficient.

Animus Revocandi

Animus revocandi.

On the other hand, destruction unaccompanied by an intention to revoke does not amount in law to revocation.

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[1] *Rule in Hearle* v. *Hicks* (1832), 1 Cl. & Fin. 20; *Re Stoodley,* [1915] 2 Ch. 295, 3 [1916] 1 Ch. 242.

[2] [1928] 1 Ch. 24.

[3] See p. 41, note 2, *supra,* for *partial* revocation by this method.

[4] *Re Dadds* (1857), *Dea. & Sw.*, 290. Cf. *Velasco* v. *Coney,* [1934] P. 143, which shows that a testatrix domiciled in Italy can *by Italian law* revoke her will by directing another person to destroy it in her absence.

[5] (1877), 2 P. & D. 251.

Consequently, a Court of Probate, if satisfied that no *animus revocandi* existed, will grant probate even of a will which has been destroyed or has disappeared.

The classic example concerns the will of Lord St. Leonards, which could not be found after his death. His daughter had frequently read it to him, at his request, towards the end of his life, and was able to memorise its contents. The Court admitted the will to probate, on her testimony, being satisfied that there was sufficient evidence to rebut the natural presumption that he had revoked it. (*Sugden* v. *Lord St. Leonards* (1876).)[1]

More recently the same problem arose on the death of the author D. H. Lawrence. Here again the will had disappeared; but the evidence showed that he had asked someone to look for it shortly before his death, and evidently therefore had not himself destroyed it. Accordingly probate was granted of its contents on evidence that it was identical with an existing will made by a brother author.[2]

Similarly, if a testator destroys a will or codicil under the erroneous belief that it has already been revoked, or that it was invalid, or with the intention of making a more legible copy of it, this is no revocation, since the destruction is not *animus revocandi.*

Revocation by Marriage

Revocation by marriage.

As a rule, a change in the testator's circumstances after he makes his will does not revoke it.[3] But by section 18 of the Wills Act, 1837, the *marriage* of a testator automatically revokes previous wills and codicils. It will be observed that this is the only case of revocation in which no *animus revocandi* need occur. In fact, for the man who makes his will on the eve of his wedding, such automatic revocation is presumably the very reverse of his intentions.

Exceptions:

(i) Law of Property Act, s. 177.

This hardship has been modified in part by section 177 of the Law of Property Act, 1925, which enacts that "a will expressed to be made in contemplation of a marriage shall . . . not be revoked by the solemnisation of the marriage contemplated." This section applies only to wills executed or confirmed after 1925.

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[1] (1876), 1 P. & D. 154. In this case the court also allowed in evidence declarations made by the testator both before and *after* he executed his will. It is doubtful whether the latter evidence should be admitted. *Woodward* v. *Goulstone* (1886), 11 A.C. 469. If the available evidence enables the court to ascertain only a part of the contents of the will, that part only will be effective. *Ibid.*

[2] *Times* Newspaper, 4th Nov., 1932.

[3] Wills Act, 1837, s. 19.

Thus, in *Pilot* v. *Gainfort* (1931),[1] a man made a will in 1927 in favour of a woman whom he intended to marry, describing her as "my wife"—which at that time she was not. He married her in the following year, and died some years later. The Court decided that the marriage had not revoked the will. (But, with all deference to the learned judge, it would seem that the will expressed rather that the marriage had *already occurred* than that it was "in contemplation"—as required by s. 177.)

(ii) Power of appointment.

Section 18 of the Act of 1837 itself provides a further exception to the rule of revocation by marriage. The approximate effect of this exception is that insofar as a will operates to exercise a power of appointment, it is not revoked by marriage unless its revocation would benefit the testator's nearest relations. The section accordingly enacts that the marriage of a testator does not revoke the exercise of a power of appointment by his will, unless the property in question would devolve on default of appointment to the persons (mainly relatives of the testator) whom the section describes. These persons, for whose benefit marriage operates to revoke an appointment, are the testator's "heir, customary heir, executor, or administrator, or the person entitled as his or her next of kin under the Statute of Distributions." Apparently, therefore, it applies only when the gift over on default of appointment is to the testator himself, or to the person or persons who were entitled to his property under the old intestacy rules. As we have seen,[2] the Administration of Estates Act, 1925, has virtually abolished the ancient rights of the *heir* (to real property) and of the *next of kin under the Statute of Distributions* (to personal property). Apparently, however, the old rules must still be applied when it is necessary to ascertain whether a testator's marriage revokes the exercise of a power of appointment by his will.[3]

Re Paul (1921)[4] illustrates the original scope of this exception. A widow, whose father had given her power to appoint property to her children, with a gift over to her *sisters* in default of appointments made a will appointing to her son. She then remarried.

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[1] [1931] P. 103.

[2] *Supra*, Ch. II, *D*.

[3] See Administration of Estates Act, 1925, Part IV, especially ss. 45, 50, 52.

[4] [1921] 2 Ch. 1.

Held: this did not revoke the appointment; for on default of appointment her sisters would have taken the property, and (since she left children) her sisters were neither her heirs nor her next of kin.

Revival of Revoked Wills

Revival of revoked wills.

If a will or codicil has been revoked, whether wholly or in part, the testator may *revive* it if he so desires. This can be done, however, only by *re-executing* the will or codicil, or by executing a further will or codicil in which an intention is shown to revive the revoked dispositions.[1] In either case, of course, the appropriate formalities of execution must be observed. The only alternative method is to make a new will or codicil, properly executed, in which the revoked dispositions which the testator desires to re-instate are set out in full; but this does not revive the former instrument—it merely makes a fresh disposition similar in terms to that which was revoked. Such a course will be essential if the former will has been destroyed.[2]

Re Baker (1929)[3] provides a modern example of revival. A testatrix made a will disposing of all her property. Several years later she made another will entirely inconsistent with the previous one—thus revoking it. Finally she made a codicil to the former will, without mentioning therein the second will. *Held:* this codicil revived the former will, and therefore impliedly revoked the second will. It is important to observe, however, that if this codicil had showed no intention to revive the first will, the first will would have remained ineffective; for the second will had revoked it. Moreover, even had she destroyed the second will, its destruction would not have operated to revive the earlier will; for the only methods of revival permitted by law are (i) re-execution, and (ii) a codicil showing an intention to revive.

Imperfect Animus Revocandi

Imperfect *animus revocandi.*

We have already seen that no will can be revoked (otherwise than by marriage) unless the testator intends to revoke it. Even if he had this intention, however, evidence may be brought to show that his intention to revoke was *conditional* upon the happening of some event which has not, in fact, occurred. In such a case his intention never matured; consequently the will stands. Thus, if a husband, having made a will in favour of his wife, destroys it because he thinks (mistakenly) that she will be entitled to all his property if he dies intestate, the will is not revoked thereby.[1]

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[1] Wills Act, 1837, s. 22. [2] *Re Reade,* [1902] P. 75. [3] [1929] 1 Ch. 668.

Doctrine of dependent relative revocation.

The same principle applies when a will is destroyed for the sole purpose of replacing it by a fresh disposition, or in order to revive a former will. Accordingly, no revocation results in such a case—unless the other disposition is, in fact, validly made or revived. This, the doctrine of *dependent relative revocation*, is applied whenever the evidence shows that the testator's intention to revoke was conditional upon the making or revival of some other disposition.

Thus, in *Dixon* v. *Solicitor to the Treasury* (1905),[2] a testator who had instructed a solicitor to draft a new will for him tore his signature from his original will because he erroneously believed that no new will could be made until previous wills had been cancelled. He died before the new will was completed. *Held:* the original will was not revoked.

Similarly a testator may make a second will which revokes his first will, and may subsequently destroy the second will because he believes that its destruction revives the original will. We have already seen that this belief is incorrect. Consequently the second will stands.

Its application to obliterations.

This doctrine applies equally where a testator intends to revoke only a part of his will. Thus, if he entirely obliterates one clause *in order to substitute another*, and fails to execute the substituted clause in the manner required by law, the original clause is not revoked—provided, of course, the Court is satisfied that he intended to cancel the one clause only on condition that the new one would prevail.[3]

In *Sturton* v. *Whellock* (1883),[4] the will, in its original form, contained legacies for each grandchild of the testator who should reach twenty-*one* years of age. After the testator's death it was discovered that he had subsequently obliterated the word "one" and had substituted "*five*." This alteration had not been properly executed, and was therefore ineffective. *Held:* the obliteration was not a partial revocation, as it had been made for the sole purpose of inserting another word. Consequently, probate was granted of the will in its original state.

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[1] *Re Southerden*, [1925] P. 177; *Re Greenstreet* (1930), 74 S.J. 188.

[2] [1905] P. 42.

[3] *Re McCabe* (1873), 3 P. & D. 94. See also *supra*, Ch. III, *B*, pp. 40–41, as to obliterations.

[4] 48 L.T. 237.

CHAPTER VII

LEGACIES AND DEVISES

A. ADEMPTION AND ABATEMENT

Ademption and abatement.

WHEN a personal representative desires to distribute the deceased's property among the persons whom the will names, he may find that the estate is unable to satisfy their claims. This difficulty may arise either (i) because a specific thing which the will designated for a particular person no longer exists, or is not available at the testator's death (e.g. if he sold it before he died), or (ii) because what remains of the testator's property after his debts have been paid is not of sufficient value to provide all the legacies and devises stipulated by the will. In the former case the gift is said to be *adeemed*. In the latter case it is said to *abate*.

Specific and general legacies.

Legacies are either "specific" or "general." A *specific* bequest bequeaths a particular thing which it describes in such a way as to distinguish it from all other things of the same kind—e.g. "I bequeath my horse Dobbin to X." A *general* legacy, however, does not specifically identify the thing bequeathed—e.g. "I bequeath £100 to X," or "£1000 East India Stock to X." Thus, whereas a specific legacy directs the executors to give to the legatee some specified article from among the testator's assets, a general legacy merely directs them to procure some unidentified article or sum of money for the legatee. The vast majority of *pecuniary legacies* are general in nature—e.g. £100 to X; but even a pecuniary legacy is sometimes specific—e.g. "I bequeath to X the money which Z now owes to me."[1] Similarly, a bequest of stock is *prima facie* a general (rather than a specific) bequest, unless the words of the gift indicate the contrary—e.g. that the testator intended to bequeath the identical stock which he held when he made the will.[2]

Advantage of specific legacy.

From one point of view a specific legacy is more advantageous to the legatee than is a general legacy; for specific gifts do not *abate* owing to insufficiency of assets, until all the property available for general gifts has been exhausted.[1]

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[1] Similarly, when a will forgives a debt owed to the testator, this is a specific legacy to the debtor. *Re Wedmore*, [1907] 2 Ch. 277.

[2] *Re Gage*, [1934] 1 Ch. 536, per Clauson, J., at p. 539.

Let us suppose that a testator's will contains only two bequests: viz. £100 to X, and the testator's horse Dobbin to Y. At his death his sole assets are, say, the horse and £200. If he dies indebted to the extent of £150 the specific bequest to Y will not suffer, whereas X's general legacy abates so far as is necessary to pay the testator's debts. Consequently X receives only £50.

If, however, the debts amount to £250, the whole of X's legacy is lost by abatement. And even Y's specific bequest is affected; for the executors must find an additional £50 wherewith to pay the debts. They will therefore sell the horse in order to obtain this sum for the creditors, and will hand any balance of the proceeds to Y.

On the other hand, a specific legacy is less advantageous in one respect than a general legacy; for a *specific* gift of certain property (e.g. "my horse Dobbin to Y") is *adeemed* if the testator parts with that property, or if it is destroyed, before he dies (e.g. if the testator sells or kills the horse, Y gets nothing). A *general* gift, however, does not fix upon any particular item of the testator's property, and is therefore unaffected by this rule.

Advantage of general legacy.

Thus, in *Re Gage* (1934),[2] a testator bequeathed "unto my niece Eleanor . . . the sum of £1150 Five per Cent War Loan 1929–47 stock *And* to M. G. the sum of £500 New South Wales Five per Cent stock *now standing in my name.*" At the time of making this will, the testator held precisely £1150 of the War Loan in question; but before he died he accepted a cash payment from the Government in lieu of it; consequently, at the date of his death he held no War Loan stock whatever. The question therefore arose whether this bequest to Eleanor was specific, and so adeemed, or whether it was a general bequest and effective. Clauson, J., decided that the fact that, when he made the will, the testator actually held stock identical in description with that bequeathed, did not render the bequest specific. Moreover, in view of the capital letter "a" of the word "And," which separated this bequest from the bequest to M.G., Eleanor's legacy was unaffected by the final words "now standing in my name." These words, therefore, although they converted the bequest of New South Wales stock into a specific legacy, did not prevent the court from construing the bequest of War Loan stock as a general legacy. Accordingly, the testator's executors were directed to purchase the specified amount of War Loan at the expense of the estate for the benefit of Eleanor, or to pay her, if she so preferred, such a sum of money as would purchase the stock in question.

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[1] Administration of Estates Act, 1925, 1st Sch., Pt. II, gives the modern rules for abatement when testator dies solvent. If he dies *insolvent* all legacies and devises must abate, and the question will arise as to which of his creditors will go unpaid: *ibid.*, Pt. I.

[2] [1934] 1 Ch. 536.

Demonstrative legacies.

A *demonstrative* legacy is something of a hybrid, for "it is in its nature a general legacy but there is a particular fund pointed out to satisfy it":[1] e.g. "£100 out of my Government Stock." Such a legacy, like a general legacy, is not adeemed if the particular fund ceases to exist before the testator dies, unless the will shows a contrary intention. Moreover, it enjoys the advantage of a specific legacy, so long as the particular fund exists, in that it does not abate for payment of debts until the general legacies have been exhausted. But if the particular fund is not sufficient (or has ceased to exist) the legatee's claim for the balance (or the whole) of his legacy is liable to abate with the general legacies.[2] Demonstrative legacies, however, are somewhat rare; and the judicial decisions as to whether a legacy is demonstrative or specific are not always easy to reconcile.[3]

Devises general and specific.

The foregoing classification of legacies is not usually applied to devises of land. Indeed, a demonstrative devise is probably an impossible conception, for, though money may be bequeathed from a certain fund for the purchase of land, a devise of land itself can hardly be made out of a particular fund. However, there appears to be no logical objection to classifying devises of land as *general* or *specific*. It is true that a well-worn maxim states that "all devises are specific"; but, whatever historical justification exists for this statement, it is of little importance at the present day.[4] Modern usage undoubtedly reserves the phrase "specific devise" for a devise which specifies and describes the land concerned, and opposes to it the phrases "general devise" and "residuary devise." A "general devise" signifies a devise by general description—e.g. "all my realty to X." A "residuary devise" is a devise by general description of such lands as have not been otherwise devised by the will—e.g. "all the rest of my real property to X." Thus, a residuary devise is normally a variety of general devise. We may, therefore, ignore niceties of nomenclature and state that "all devises are either general or specific."[1]

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[1] *Per* Lord Thurlow, *Ashburner* v. *Maguire* (1786), 2 Bro. Ch. 108.

[2] Administration of Estates Act, 1925, 1st Sch., Pt. II, and s. 55 (1) (ix).

[3] Thus a bequest of money "out of" a specified money fund, or of stock "out of" specified stock, is usually construed as a specific legacy; but a bequest of money "out of" stock, as a demonstrative legacy. *Kirby* v. *Potter* (1799), 4 Ves. 748; *Mullins* v. *Smith* (1860), 1 Dr. & Sm. 204.

[4] See Holdsworth, *History of English Law,* VII, 362–366.

Abatement and ademption of devises.

The rule as to abatement and ademption are as applicable here as to legacies. A specific devise (e.g. of Blackacre) is *adeemed* if the testator parts with the specified land before his death; whereas a general or residuary devise operates upon whatever land (within the general description) he has at his death, whether or not it is the land which he held at the time of making his will.[2] On the other hand, a specific devise does not *abate* for the payment of debts until all general devises and bequests have been exhausted.[3]

Contrary intention: (*a*) Abatement.

These rules as to *abatement* may be varied by directions contained in the testator's will.[4] Thus, he may direct that some particular part of his property shall be used for the payment of his debts, to the exoneration of the rest of his estate; and such a provision will accordingly establish which beneficiaries under his will are to suffer from the insufficiency of assets.[5]

(*b*) Ademption.

Moreover, a will sometimes prevents *ademption* from operating to penalise a specific devisee or legatee. Thus, it may provide that the specific devisee of Blackacre is to be given a pecuniary legacy of equal value if Blackacre is no longer the testator's property when he dies. But it should be remembered that a specific gift is equally adeemed whether or not the testator *voluntarily* parted with the property concerned. Thus, a specific gift of articles which are subsequently lost at sea,[6] or of property which an Act of Parliament compels the testator to sell, or of stock which is converted by Act of Parliament into stock in a substantially different concern,[7] is adeemed; and the specific legatee or devisee can claim no compensation for his loss unless the will (or Act of Parliament[1]) enables him to do so.[2]

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[1] This classification appears to be implicit (*inter alia*) in the Wills Act, 1837, ss. 26, 27; Law of Property Act, 1925, ss. 175, 176; Administration of Estates Act, 1925, 1st Sch., Pt. II. Similarly, a residuary bequest, or bequest of all the personal estate, commonly ranks as a *general* legacy.

[2] Wills Act, 1837, s. 24. The same is true of a residuary *bequest* or a general bequest of the whole of a testator's personal estate.

[3] Administration of Estates Act, 1925, 1st Sch., Pt. II. But general and residuary devises and residuary bequests abate before any other general bequest.

[4] Administration of Estates Act, 1925, s. 34 (3).

[5] *Re Petty* (1929), 1 Ch. 726; *Re Atkinson*, [1930] 1 Ch. 47.

[6] *Durrant* v. *Friend*, [1852] 5 De G. & Sm. 343.

[7] *Re Slater*, [1907] 1 Ch. 665; cf. *Re Leeming*, [1912] 1 Ch. 828.

Mortgaged property. Administration of Estates Act, s. 35.

In connection with abatement, the provisions of section 35 of the Administration of Estates Act, 1925, should be borne in mind. At one time a devisee or legatee was scarcely concerned with any mortgages or charges which had been imposed upon the property devised or bequeathed to him. It was the business of the testator's executors to pay all his debts, including those in respect of which he had mortgaged or charged his property; and the legatee or devisee was entitled to claim the property from them freed from any charges or mortgages which it bore at the testator's death —unless the will directed otherwise. This rule was particularly advantageous to a *specific* legatee or devisee of mortgaged property; for, as we have already seen, the testator's debts are usually paid at the expense of general and residuary gifts. As regards charged or mortgaged *land*, however, the rule was reversed by the Real Estate Charges Acts, 1854, 1867, and 1877; and, finally, these Acts have been replaced by section 35 of the Act of 1925, which reverses the rule for every devise *and bequest* of charged or mortgaged property by a testator who dies after 1925.[3] The section enacts that a debt charged upon property must be paid at the expense of that property, unless the testator signified a contrary intention in his will or in some other document.[4] Thus, in modern times, the general assets of a testator are not usually taken to pay a mortgage debt, except insofar as the mortgaged property is insufficient to discharge it.[5]

B. THE POWERS AND DUTIES OF PERSONAL REPRESENTATIVES

Extent of liability of personal representatives.

We have already seen that the personal representatives of a testator are required to pay his debts, and must use his property for that purpose in the order prescribed by law.[1] Their liability for his debts, however, is limited to the value of his assets; hence, they are not usually liable to pay out of their own pockets. Nevertheless, if the estate is insolvent and they pay creditors in the wrong order,[1] or pay legacies before the creditors have been paid, or if they waste the estate, they may be called upon to make up any deficiency caused by their misconduct. Moreover, if personal representatives themselves incur debts or other liabilities in the course of administration they are personally liable thereon, though if such liabilities are properly incurred they have usually the right to recoup themselves from the deceased's estate.[2] Thus, if they carry on the testator's business, they are personally liable to pay the debts which they incur thereby; but they have a right of indemnity as against the assets of the deceased, provided that they were authorised by the will to retain the business, or retain it only so long as is necessary in order to wind it up or sell it advantageously.[3]

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[1] *Re Jenkins*, [1931] 2 Ch. 218. See Lunacy Act, 1890, s. 123 (1) as to sales of lunatics' property by order of the Court: *Re Harding*, [1934] 1 Ch. 271.

[2] See *post*, Ch. VIII, *A*, for the cases in which the equitable doctrine of conversion operates to adeem a specific gift.

[3] I.e. Administration of Estates Act, 1925, s. 35, applies not only to devises and bequests of interest in *land* but to bequests of *pure personalty* also.

[4] See s. 35 (2) as to what is *not* a contrary intention for this purpose; also *Re Fegan*, [1928] Ch. 45.

[5] Administration of Estates Act, 1925, 1st Schedule.

Powers of personal representatives.

For the purposes of administration the personal representatives have wide powers over the deceased's property.[4] Thus, they have power *to sell* any of the property in order to produce the money required for payment of debts, etc. They have power also *to assent* to the vesting of the remainder of the property in the persons to whom it is devised or bequeathed.[5] Moreover, if the person entitled to a legacy or devise is prepared to accept some other part of the testator's property in lieu of the benefit which the will prescribes for him, they have power *to appropriate* it in his favour.[6]

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[1] *Supra*, pp. 5–6. But s. 34 (2) of the Administration of Estates Act, 1925, preserves their right to *prefer* creditors (including themselves) as against other creditors of the same degree; see Snell's *Equity*, ch. XVI.

[2] But a personal representative ordinarily has no right to claim any remuneration or allowance for his own personal exertions or loss of time in the exercise of his duties. For this reason it is customary to bequeath a pecuniary legacy to each executor—see *supra*, p. 59. See Keeton, *Law of Trusts*, pp. 277–281, as regards the right of a trustee to charge for his services.

[3] *Re Evans* (1887), 34 Ch.D. (C.A.) 597. As to their liability for the rent and covenants of a lease, see Trustee Act, 1925, s. 26; Keeton, *Law of Trusts*, pp. 257–258.

[4] Administration of Estates Act, 1925, s. 39. This includes also entailed property which the will disposes of (under Law of Property Act, s. 176), and property over which it exercises a general power of appointment: Administration of Estates Act, ss. 32 (1), 55. The powers conferred by s. 39 include all the statutory powers of trustees for sale—e.g. power to grant leases of land. See Law of Property Act, 1925, s. 28.

[5] Administration of Estates Act, 1925, s. 36—or (as regards real estate) in persons entitled under the intestacy rules.

[6] *Ibid.*, s. 41.

"Executor's year."

As a general rule, a personal representative is not bound to distribute any part of the deceased's property among the legatees and devisees before the expiration of one year from the death.[1] This period is, therefore, called "the executor's year." If he chooses, he is entitled to distribute the property within the year; but he cannot be compelled to do so, even if the will directs payment at some earlier time. In either case he should take care to issue the prescribed advertisements for creditors at least two months before he distributes the property; for if he does this he escapes personal liability in respect of any debt of which he had no notice when the distribution occurred.[2]

Interest

Interest on general pecuniary legacies.

A *general pecuniary legacy* normally carries interest, usually at 4 per cent per annum, as from the end of the executor's year; for that is the time when legacies should usually be paid. If, however, the will directs that the legacy be paid at some other time, interest is payable as from the time so fixed for payment.[3] Accordingly, a legatee is compensated, to this extent, if the executors unduly delay payment of his legacy; for he can claim interest upon it in respect of the period during which they improperly withhold from him.

In certain exceptional cases a legatee is entitled to interest upon such a legacy as from the date of the testator's death. Of these the most important is where the legacy is bequeathed to an *infant* either (i) by one of his parents, or (ii) by a person who stands *in loco parentis* to him,[4] or (iii) by any other person if the income from the legacy is plainly intended for his support.[5]

Moreover, the infant is so entitled to interest in these cases even when the will states that his legacy is *contingent* upon some future event, provided that the contingency is his reaching 21 years of age or marrying under that age,[1] or that the income of the legacy is clearly intended for his support.[2] Evidently, therefore, the law presumes that a person who takes upon himself the responsibility of supporting an infant has no desire to leave him penniless while the executors are winding up the estate, or pending the customary contingencies of reaching full age or previous marriage. But if the will expressly states that the legatee is, or is not, to get interest upon his legacy, the above rules are inapplicable, for then the testator's wishes are obvious.

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[1] *Ibid.*, s. 44. Query whether s. 36 (10) compels him to distribute at once if all debts and death duties have been paid or provided for.

[2] Trustee Act, 1925, s. 27. But the creditor is entitled to follow the assets into the hands of any recipient except a purchaser for value. Administration of Estates Act, 1925, ss. 32 (2), 38.

[3] *Lord* v. *Lord* (1867), 2 Ch. App. 782. Thus a future (or contingent) legacy normally bears interest from the time when the legacy becomes due (or the contingency occurs).

[4] But (i) and (ii) are excluded if the will shows a contrary intention or provides some other fund for the infant's maintenance: *Wynch* v. *Wynch* (1788) 1 Cox. 433. In these cases five per cent is payable if the legacy is producing sufficient income: Trustee Act, 1925, s. 31 (3).

[5] *Re Stokes*, [1928] Ch. 716. Interest runs from the death also when a legacy is charged on land or is bequeathed in satisfaction of a debt.

Income

Income from legacies and devises.

With the exception of general pecuniary legacies, a legatee has no right to claim *interest* upon the value of property bequeathed to him; nor has a devisee—unless, of course, the will directs it. If, however, the property devised or bequeathed to him is, in fact, producing *income* (e.g. land let at a rent) he is entitled to all the income which arises from it after the testator's death; and this is so even if the will gives him only a future or contingent interest in the property, except where the will provides that the intermediate income is to be paid to some other person.[3] On the other hand, if the executors incur expense for the upkeep of property specifically devised or bequeathed, that property must itself bear the cost; for it would be unfair to allow the donee to take the income from the property and escape the cost of preserving it.[4]

Maintenance

Maintenance out of income.

As a general rule, a legatee or devisee whose gift carries income or interest, as above, cannot claim the income or interest which has accrued in his favour until he receives the gift itself. Thus, if land producing income is devised to A, he will normally receive the land together with one year's income therefrom at the end of the executor's year. Or, if the devise is contingent upon his passing a certain examination he will on passing that examination receive both the land and the income which it has produced since the testator died. Where the legatee or devisee is an *infant*, however, this might lead to hardship, for an infant is usually incapable of supporting himself, and may urgently require some of the income for his maintenance or education, or even a substantial advance of capital with which to set himself up in business. Personal representatives (and trustees of property) have, therefore, power to apply a reasonable part of the income for the benefit of an infant beneficiary whenever they see fit to do so; and they can be compelled to pay the income in full to a beneficiary, if he is of full age;[1] but in either case this is so only if the legacy or devise carries income or interest as described above.

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[1] *Re Abrahams*, [1911] 1 Ch. 108. As a general rule future or contingent legacies do not bear interest until they become payable.

[2] *Re Jones*, [1932] 1 Ch. 642.

[3] Before 1926 *contingent* devises or legacies (other than of residuary personalty) did not carry intermediate income. This was altered by Law of Property Act, 1925, s. 175.

[4] *Re Rooke*, [1933] Ch. 970; *Re Pearce*, [1909] 1 Ch. 819; cf. *Sharp* v. *Lush* (1879), 10 Ch.D. 468, 472.

Advancement

Advancement out of capital. Trustee Act, s. 32.

Furthermore, they have power to *advance* part (not exceeding one-half) of the *capital* value of a money legacy, even if it is future or contingent.[2]

Thus, in *Re Raine* (1929)[3], a testatrix died in 1926 having bequeathed £2000 to her god-child if and when he should reach 21 years of age. There was nothing to show that she had taken upon herself the duty of supporting him or that the legacy was intended for his support. Hence, since she was not his parent, the legacy did not carry interest during his minority. Consequently, there was no power to apply any of the income therefrom for his maintenance.

If, however, the testatrix had been the legatee's parent (or if the gift had been not a pecuniary legacy but a specific or residuary devise or bequest of income-producing property) the gift would have carried the income with it; and consequently a power of maintenance would have existed, unless the will prescribed some other destination for the income from the property.[4]

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[1] Trustee Act, 1925, s. 31. The section applies even where the infant's interest in the property is contingent on a double event: *Re Garrett*, [1934] 1 Ch. 477. As regards beneficiaries of full age, see *Re Spencer*, [1934] W.N. 209.

[2] *Ibid.*, s. 32. This power applies also *inter alia* to property held upon trust for sale. Before 1926 advancements required the consent of the Court. See Keeton, *Law of Trusts*, pp. 229–263 for fuller treatment of maintenance and advancement.

[3] [1929] 1 Ch. 716.

[4] *Re Reade-Revell*, [1930] 1 Ch. 52.

The power to *advance capital* applies even if the legacy does not carry intermediate income, though in such a case one must first obtain the consent of the person who is entitled to the income, for a decrease in capital will lead to a reduction of his income. Hence, the executors in *Re Raine* could have paid up to £1000 for the god-child's benefit even before he reached 21, provided that the residuary legatee being of full age consented in writing thereto.[1]

C. SUCCESSIVE INTERESTS IN THE SAME PROPERTY

Wills frequently contain dispositions of property calculated to benefit several persons in succession. The most usual disposition of this type is a devise or bequest to the testator's widow for her life with remainder to his children after her death. Successive interests, however, are almost invariably equitable. It is, therefore, customary to devise or bequeath such property to trustees upon trust for the successive beneficiaries; otherwise the personal representatives will convey the property to trustees selected in the manner required by law, or, in some cases may themselves act as trustees of the property.[2]

Income

Income.

The general rule as regards the respective rights of successive beneficiaries is that each in turn is entitled to all income produced by the property whilst his interest endures. Thus, the widow, in the example given above, is *prima facie* entitled to all income derived from the property from the time of the testator's death[3] until she dies, and thereafter the children will be entitled to all subsequent income. If, however, the property is producing periodic income (e.g. land let or investments producing a quarterly or annual rent or dividend), and the tenant for life dies, the remaindermen are not necessarily entitled to the whole of the next instalment of income; for periodical payments are deemed

Apportionment Act, 1870.

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[1] Trustee Act, 1925, s. 32 (1) (*c*).

[2] If the property is "settled land," within Settled Land Act, 1925, it must be conveyed to the tenant for life (if of full age) as trustee, by a vesting instrument. As regards other cases see Trustee Act, 1925, ss. 36, 41.

[3] Or from the end of the executor's year—See Section *B*, *supra*.

to accrue from day to day, unless the will provides otherwise.[1] Hence, if the property is producing £365 per annum, payable annually, and the tenant for life dies one week before payment is due, the remainderman is entitled only to £7 from the income of the current year, and must pay the balance to the personal representatives of the deceased tenant for life. The same principle applies, moreover, when reckoning how much income is due to a legatee or devisee on the death of his testator; for when property which is producing income is devised or bequeathed, the gift does not (unless the will so provides) carry any income which the property produced during the testator's lifetime. An executor who receives income from the testator's property must, therefore, be careful to ascertain what proportion of that income accrued while the testator was still alive.

Rule in *Bouch* v. *Sproule.*

These rules are applicable whether the property in question is real property, producing rent, etc., or personal property—such as shares producing dividends. But with regard to *shares in a company*, it may be that the company has power to distribute its profits among its shareholders *either* by declaring a dividend (which entitles shareholders to a cash payment—the normal method), *or* by issuing bonus shares. The issue of bonus shares is sometimes described as "capitalising" the profits; for it enables the company to retain its profits in its own hands, whilst the shareholder obtains only additional shares which will presumably bring him cash dividends in future years. Let us suppose that a testator bequeathed shares in such a company to trustees *upon trust for A for life, with remainder upon trust for B absolutely.* Some years after the testator's death the company (having power to do so) issues bonus shares instead of paying a dividend to its shareholders. Is A entitled to these bonus shares? Certainly he would have been entitled to any dividend paid in respect of the original shares, for dividends are clearly income. But shares are *capital.* Consequently, these bonus shares will be retained by the trustees, and A has no claim to them, save that he receives any dividends which they produce thereafter. This is known as the *rule in Bouch* v. *Sproule*,[2] and its obvious effect is to benefit the remainderman (B) at the expense of the tenant for life (A); for, when A dies, B becomes absolutely entitled to all the shares held by the trustees. The rule applies unless the will clearly shows that the life-tenant was intended to take whatever comes to the shares from the profits of the company whether distributed in the form of income or capitalised by the company.[1]

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[1] Apportionment Act, 1870.

[2] (1887) 12 A.C. 385. See further Keeton, *Law of Trusts*, pp. 245–246; also article by W. Strachan, 46 Law Quarterly Review, pp. 334–340.

Settled Residue

Settled residue.

If a testator settles specific property upon persons in succession there is little difficulty as to the rights of the beneficiaries to the income therefrom. But if a *residuary* devise or bequest is settled by the will (e.g. upon the widow for life with remainder to the children) two important problems arise. It is necessary to ascertain, first, what the "residuary estate" includes; and, secondly, whether the tenant for life is entitled to the whole of the income which it produces.

(*a*) What constitutes the residuary estate.

The "residue" of a testator's estate comprises what remains when his debts have been paid, and all other legacies and devises have been met. As we have seen, however, the distribution usually occurs at the end of the "executor's year"; and during this year it is likely that the estate has been producing income. Consequently, the personal representatives have in hand a year's income from the property (besides the property itself), which is available to meet the claims of creditors and beneficiaries.

A residuary devise or bequest carries the right to income from the date of the testator's death.[2] It would, therefore, be unfair to the tenant for life of settled residue if the personal representatives were entitled to say "All the income we received during the executor's year has been used for paying debts and legacies, so there is none for you." On the other hand, it would be equally unfair to give him all the income received during that year; for this would mean that he obtains, not only the income from the eventual residue, but also that derived from any property which has since been used for paying debts and legacies. A mathematical calculation must, therefore, be made which will ensure that he gets the income derived from the eventual residue, and no more.

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[1] See *Re Speir*, [1924] 1 Ch. 359. *Aliter* if the capitalisation is improper, or if the bonus is issued in cash: in these cases the "bonus" usually belongs to the tenant for life—as income.

[2] *Supra*, p. 79.

Rule in *Allhusen* v. *Whittell*.

For this purpose the *rule in Allhusen* v. *Whittell*[1] originated. In normal cases it operates fairly enough; but being founded upon the assumption that all debts and legacies are paid at the end of the "executor's year," it may work injustice in cases where they are paid at some other time; the Courts, therefore, follow it only when satisfied that substantial justice is done;[2] and wills sometimes exclude it by empowering the executors to adjust such matters in their discretion.[3] The rule, when applicable, prescribes that debts and legacies are deemed to have been paid out of so much of the estate as will, *together with one year's income therefrom*, produce the sum required to meet them. The remainder of the estate is the "residue"; and any income derived from this is paid to the tenant-for-life of the residue as his income therefrom.

Example.

A testator leaves assets valued at £20,000, invested in trustee securities producing £1000 per annum (i.e. 5 per cent). He bequeathed £1000 to a nephew, and all the rest of his property to his widow for life with remainder to his only child. His executors pay his debts, which amount to £50, and the legacy of £1000 to his nephew. By the end of the executor's year the testator's investments have yielded £1000 income. They have therefore a balance in hand amounting to £21,000 *minus* £1050 (paid to creditors and legatee) = £19,950. They must now decide how much of this sum is to be paid to the widow as her income for the past year. By the rule in *Allhusen* v. *Whittell* we must assume that the £1050 paid out for debts and legacy was derived from so much of the capital as, together with interest accruing thereto, produced that sum in the year—viz. £1000. Therefore, the "residue" amounts to £19,000; and the remaining £950 must be paid to the widow as her income therefrom for the first year.

(*b*) Is tenant for life of settled residue entitled to the full income therefrom?

As a general rule, a life-tenant of property is entitled to *the whole* of the income which it produces during his lifetime. This is usually perfectly fair; for when the life-tenant dies his successor will take the income in his turn. But if the property consists of unreliable investments it may well be that, although (as is usual with speculative concerns) it is producing a high rate of interest now, it will ultimately degenerate and produce no income at all. Similarly, if the property is a lease (e.g. with twenty years still to run) it is obvious that, whatever income it is now producing, it will produce nothing after the lease expires. Hence, the tenant for life of speculative investments or of leasehold property is unduly favoured at the expense of his successor (the remainderman) if he is allowed to take the full annual income from the property; for when he dies, and the remainderman becomes entitled to the income, there may be little (if any) income to take.

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[1] (1867), L.R. 4 Eq. 295.

[2] *Re McEuen*, [1913] 2 Ch. 704; *Re Wills*, [1915] 1 Ch. 769; *Re Shee*, [1934] 1 Ch. 345—rule applied to costs of disposing of onerous lease included in settled residue.

[3] E.g. Statutory Will Forms, 1925, Form 8, Clause 7 (*c*).

Consequently, the Court of Chancery was reluctant to allow a life-tenant to take the full income in such cases as these. True, it could not interfere if a testator had settled *specific* property of a wasting or hazardous nature upon persons in succession, for it must follow the testator's intentions when they are clearly expressed. But, if a testator bequeaths the *residue* of his property to persons in succession, the Court presumes that he desires to deal equitably with them, and that he wishes any property of a wasting or hazardous nature which his "residue" contains to be sold at the earliest opportunity, and replaced by reliable investments which are likely to produce a permanent regular income.[1] The Court of Chancery was abolished by the Judicature Act, 1873; but its jurisdiction and the equitable doctrines which it formulated still exist, and are now applied by every Division of the High Court of Justice.

Express trust to convert.

Sometimes a bequest of residue upon trust for persons in succession *expressly* provides that the property must be sold and converted into authorised investments. Even here, however, the tenant for life may be unduly favoured so long as the property remains unsold. Hence, unless the will shows a contrary intention, the Court treats him at the outset as though the conversion had occurred. He is, therefore, entitled to no more income than 4 per cent per annum on the value which the property held at the end of the executor's

Life-tenant is not entitled to full income, pending sale.

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[1] See Trustee Act, 1925, ss. 1–11, for the authorised investments usually available to trustees—sometimes called "trustee securities."

year.[1] If the property is actually producing a higher income than this the excess is treated as *capital*, and is at once invested in authorised securities. Consequently, although the life-tenant will receive what income arises from these securities, the fact that the excessive income has been capitalised ensures that the remaindermen also will benefit from the high return which the property is now producing. Apparently, this rule was first applied in *Gibson* v. *Bott* (1802).[2] It never applied to real property.[3] It concerned only so much of the residue as consisted of *personal property*: it therefore included (*a*) unauthorised investments, and (*b*) leaseholds. After 1925, however, leaseholds are outside the ambit of the rule, for section 28 (2) of the Law of Property Act, 1925, provides that the income of *land* held upon trust for sale is to be treated as if it were the income from the ultimate investment of the proceeds of sale. Accordingly, unless the will shows that the testator wished the life-tenant to take a reduced income pending sale,[4] the rule does not now apply to the income arising from any *land*, whether freehold or leasehold,[5] comprised in a residuary gift.

Except from realty, and (after 1925) leaseholds.

Or if the will shows a contrary intention.

The rule is never applied if the will shows a clear intention that the life-tenant is to have the whole of the income from the residue pending conversion. The fact, however, that the will empowers the executors or trustees to postpone conversion does not necessarily show this intention, for such a power is usually inserted merely in order to allow the retention of the property until a favourable price can be obtained.[6]

Thus, in *Re Brooker* (1926),[7] a testator died in 1903 having bequeathed his residuary estate to trustees upon trust for his five children in equal shares. Three of these children were daughters, and the will settled the share of each daughter upon her for life with remainder to her children. The will directed the trustees to sell and convert the residuary property, but empowered them to postpone conversion at their discretion. The residue included several leasehold properties; and the trustees retained them in the exercise of this discretion. Until the end of 1925 they paid only part of the income from these leaseholds to the life-tenants (as prescribed by the rule in *Gibson* v. *Bott*), investing the surplus income in authorised securities. The Court decided, however, that *all* the profits accruing therefrom *after* 1925 must be paid out as income.

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[1] The Court has sometimes fixed other rates—e.g. 3 per cent or 3½ per cent, on analogy with the rates obtainable by authorised securities. See *Wentworth* v. *Wentworth*, [1900] A.C. 163, 171. The value is sometimes taken at the *testator's death*, e.g. if the will gives a power to postpone conversion for the benefit of the estate generally.

[2] 7 Ves. 89. It is usually called the *Rule in Dimes* v. *Scott* (1827), 4 Russ. 195, or the *Rule in Meyer* v. *Simonsen* (1852), 5 De G. & S. 723; but the latter is a misnomer, for in that case there was no express trust to convert.

[3] *Re Oliver*, [1908] 2 Ch. 74.

[4] S. 28 (2) is inapplicable if there is "any direction to the contrary in the disposition on trust for sale or in the settlement of the proceeds of sale."

[5] Law of Property Act, 1925, s. 205 (1) (ix).

[6] *Re Chaytor*, [1905] 1 Ch. 233; *Re Inman*, [1915] 1 Ch. 187.

[7] [1926] W.N. 93.

Implied trust to convert.

The above rule, as we have seen, applies when a will settles residuary personalty on persons in succession, and *expressly* directs that it be sold and converted into authorised investments. But even if the will does not direct this to be done the Courts presume that such is the testator's intention as regards any property of a *wasting* or *hazardous* nature which happens to form part of his residuary estate. The very fact that he settled the residue upon persons in succession suggests that he did not desire the tenant for life to absorb the greater part of the property at the expense of the remaindermen; moreover, the maxim "equity is equality" demonstrates that rules of equity favour fair and equal treatment for all parties. Accordingly, the *rule in Howe* v. *Lord Dartmouth*[1] prescribes that the executors or trustees of residuary personalty settled upon persons in succession must convert it into authorised investments insofar as it is of a wasting or hazardous nature.

Rule in *Howe* v. *Dartmouth*.

For this purpose "authorised investments" include (i) securities in which trustees are entitled by law to invest trust money,[2] and (ii) any other investment which is authorised by the will.[3] Hence, the rule does not apply to any part of the residue which is already invested in such investments. But, apparently, any other investment is considered to be "wasting and hazardous," and must, therefore, be converted into authorised investments as the rule prescribes.

When the rule applies, raising a duty to convert residuary personalty into authorised investments, the result is the same as if the will had expressly directed this to be done. Thus, the tenant-for-life is not necessarily entitled to the whole of the income which unauthorised investments are producing. He can claim no more than 4 per cent per annum on their market value;[1] for this is presumably the income which authorised investments would yield. Similarly, any surplus income becomes capital, and is therefore invested in authorised investments, and the tenant-for-life will take whatever income these produce.

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[1] (1802) 7 Ves. 137.

[2] See Trustee Act, 1925, ss. 1–11. The Courts describe them somewhat guardedly as "investments of which the Court approves": e.g. *Meyer* v. *Simonson* (*supra*), at p. 726; *Brown* v. *Gellatly* (1867), L.R. 2 Ch.App. 751, 758–759.

[3] *Brown* v. *Gellatly* (*supra*), at pp. 758–759.

Contrary intention.

These duties to convert wasting or hazardous investments, and to reduce the life-tenant's income in the meantime, are excluded if the will exhibits a contrary intention.[2] The multitude of decisions as to what constitutes sufficient evidence of a contrary intention are, however, somewhat technical and difficult to reconcile. It is, therefore, advisable when drafting a will to state expressly what the testator desires to be done; otherwise this question may result in litigation. Thus, a clause empowering the executors or trustees to sell the property at their discretion is sometimes taken as sufficient evidence of an intention to exclude the rule.[3] So also is a clause empowering them to retain the property in its existing form.[4] Hence, there is usually no duty to convert investments in such cases, or to set aside any part of the income pending conversion, unless some other words in the will show that the testator desired this to be done.[5]

Freeholds and leaseholds.

Although the rule in *Howe* v. *Lord Dartmouth* never extended to *freeholds*, comprised in a residuary gift, it formerly applied to *leasehold* interests;[6] since a lease is of a wasting nature and is, therefore, unsuitable as a permanent source of income.[7] Section 28 (2) of the Law of Property Act, 1925, however, severely restricts the application of the rule to leaseholds; for, even if the Court continues to apply that part of the rule which directs that they must be sold and converted into authorised investments, this section enacts that the tenant-for-life will be entitled in the meantime to all the income which they produce—unless the will shows a contrary intention.[1]

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[1] The value should usually be taken (*semble*) at the end of the executor's year, since this is normally the earliest date at which the executors could be required to effect a conversion. *Aliter* if the will direct that conversion be deemed to occur at the death: *Re Trollope*, [1927] 1 Ch. 596.

[2] *Macdonald* v. *Irvine* (1878), 8 Ch. D, 101, 124.

[3] *Re Pitcairn*, [1896] 2 Ch. 199; cf. *Brown* v. *Gellatly* (1867), L.R. 2 Ch. App. 751.

[4] *Brown* v. *Gellatly* (*supra*): a power "to invest at their discretion or allow to remain as at present invested, all my funds in" certain specified securities. *Held*: no duty to convert or to reduce the life-tenant's income.

[5] E.g. a power to retain ships "for the benefit of my estate" until they can satisfactorily be sold. *Held*: only 4 per cent payable pending conversion: *ibid.*

[6] *Re Wareham*, [1912] 2 Ch. (C.A.) 312.

[7] *Supra*, p. 85.

Rule in *Re Chesterfield's Trusts*.

It will be remembered that both the rule in *Howe* v. *Lord Dartmouth*, and the analogous rule applicable when a bequest of residue *expressly* directs the conversion of unauthorised investments, usually operate to *reduce* the income payable to the tenant-for-life of settled residue. Similar equitable principles of equality, however, sometimes work in his favour. Thus, if part of the residue consists of a reversionary or future interest, that part is producing no income, as yet, for the life-tenant. Nevertheless, the courts of equity evolved a rule which secures to him a fair share of the benefits from such property—*the rule in Re Chesterfield's Trusts.*[2] Again the trustees or executors are under a duty to sell this reversionary interest and replace it by authorised investments producing a regular income. And if they delay doing so the tenant-for-life can claim, when it is ultimately sold, a proportion of the proceeds of sale so calculated as to recompense him for his loss of income.

Illustrations.

Take the case of a testator who bequeathed his residuary personalty upon trust for his widow for life and, after her death, for his children. Let us suppose that the residue includes (*a*) money invested in a theatrical venture, and (*b*) an interest in £14,000 which, by virtue of his father's marriage settlement, is to come to him absolutely when his mother dies.

(*a*) The executors or trustees should convert this "hazardous" theatrical investment into authorised securities. If they retain it for any period they should employ a valuer to estimate its value, and should pay the widow out of the income which it is producing no more than 4 per cent per annum upon the sum at which he values it.[3] *Howe* v. *Dartmouth.*

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[1] Wolstenholme and Cherry's *Conveyancing Statutes* (12th ed.), p. 271, contends that the Court will therefore hold that no implied trust for sale arises in such a case. Cf. *Cambridge Law Journal*, IV, pp. 357–365, where it is contended that the trust for sale still arises, and is even more necessary than before in order to produce an equitable result; for so long as the lease remains unsold the life-tenant is now unduly favoured at the expense of the remainderman, in that he is now entitled to the whole of the income from the wasting leasehold property.

[2] (1883), 24 Ch.D. 643; see also *Re Baker*, [1924] 2 Ch. 271.

[3] The cases are not consistent as to whether the value should be assessed as at the date of death or at the end of the executor's year. *Supra*, pp. 86, note 1, and 88, note 1.

(*b*) So long as the testator's mother is alive she will be entitled to the income from the £14,000. Hence, no income is yet available for the widow from this source. The executors or trustees should therefore sell this reversionary interest and invest the proceeds in authorised securities. If they delay the sale, e.g. for two years—the widow loses income in the meantime, and is therefore entitled to claim part of the proceeds of sale as compensation. In order to ascertain her rights one must calculate what sum, invested at 4 per cent per annum compound interest at the time when the sale should have occurred,[1] would reach the amount which the actual sale produces. Thus, if after two years' delay the sale realises £10,816, she is entitled to £816 therefrom as interest for the past two years. The remaining £10,000 is then invested in authorised securities. *Re Chesterfield's Trusts.*

The same calculation would be used if the trustees and executors failed to sell, preferring to wait until the testator's mother dies. On her death the full £14,000 accrues to the residuary bequest, and the widow's arrears of interest will be ascertained by finding what sum, invested at 4 per cent compound interest at the time when the duty to sell arose, would have reached this figure. Thus, if four years elapse before she dies, the required sum is approximately £12,000, and the widow obtains the remaining £2000 in compensation for loss of income.

In both (*a*) and (*b*), however, the widow is entitled to the actual income produced by the existing investments—neither more nor less—if the will shows an intention to exclude the above rules.[2]

D. DOUBLE LEGACIES

When a testator bequeaths two legacies to the same person it is sometimes difficult to ascertain whether both legacies should be paid, or whether one was given in substitution for the other. In some of these cases the will itself solves the problem by indicating what the testator really intended. Otherwise, the following presumptions are usually applied. (i) When the legacies are of unequal amounts, both are payable. (ii) When they are equal, (*a*) only one is payable if both are bequeathed by the same document; but (*b*) if they are bequeathed by separate documents (e.g. one by will and the other by codicil) both are payable, unless each is stated to be given for the same motive.

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[1] Usually the Court selects the date of testator's death for this purpose—*Re Chesterfield's Trusts* (*supra*); *Beavan* v. *Beavan* (1869), 24 Ch.D. 649. Sometimes the end of the executor's year—*Wright* v. *Lambert* (1877), 6 Ch.D. 649 (simple interest).

[2] See Keeton, *Law of Trusts*, Ch. XIV (*A*), for further treatment of the topics treated in this section.

Thus, the only case in which a presumption exists that only one legacy was intended is where the legacies, being equal in amount, are either given by the same document or expressed to be for the same motive. This presumption, however, is rebuttable; consequently, the legatee can claim both legacies if he produces adequate evidence that both were intended to operate, and even parol evidence of the testator's intentions is allowed on this point.[1]

E. DISCLAIMER

A legatee or devisee cannot be compelled to accept a legacy or devise. He is entitled to *disclaim* the gift, if he so desires;[2] and such disclaimer is usually effective whether he make it by deed, or by word of mouth, or by conduct.[3] Furthermore, by rejecting one gift he does not thereby disqualify himself from taking another gift conferred by the will, unless the two are combined in a single bequest,[4] or the will is so framed as to show that he was intended to take both or neither. In practice, of course, persons usually disclaim property only when it is to their advantage to do so—e.g. if the gift is of an onerous nature, such as a lease burdened with an unduly heavy rent. Sometimes, moreover, the testator fetters the gift with some unattractive condition which stimulates the legatee to reject it.

If a legacy or devise is disclaimed, it is a nullity. The result, therefore, is the same as if it had lapsed. Hence, the gift, if specific, falls into residue;[5] or, if residuary, devolves as on intestacy.

Thus, in *Re Sullivan* (1930),[6] a testator bequeathed his residuary estate to trustees upon trust for his widow for life with remainder for his children. He left no children. The residue included royalties on certain musical copyrights; and the question arose whether his widow was precluded by the rule in *Howe* v. *Dartmouth* from taking the whole of the income from this "hazardous and wasting" source. The Court decided that she could disclaim her life interest; whereupon (as there were no children) the property would devolve as on intestacy. By the intestacy rules the widow is entitled to the property for her life, and takes the *whole* of the income therefrom, irrespective of the nature of the investments.[1] The disclaimer was therefore to her advantage.

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[1] *Hurst* v. *Beach* (1821), 5 Mad. 351. Parol evidence cannot usually be brought (*semble*) to rebut presumptions that *both* are payable (e.g. legacies unequal in amount); for these appear to be rules of construction, rather than mere presumptions; consequently they stand, unless the *will* read in the light of surrounding circumstances shows a contrary intention. See *post*, s.t. Construction, Chapter XIII; and Hawkins on *Wills* (3rd ed.), pp. 352–355.

[2] For disclaimer by a trustee, see Keeton, *Law of Trusts*, pp. 189–190; *Re Clout and Frewer*, [1924] 2 Ch. 230.

[3] Apparently a *married woman* can disclaim an interest in property only by deed—Law of Property Act, 1925, s. 168. Moreover an infant or lunatic cannot effectively disclaim property while under disability.

[4] *Re Hotchkys* (1886), 32 Ch.D. 408; cf. *Andrew* v. *Trinity Hall* (1804), 9 Ves. 525.

[5] *Re Backhouse*, [1931] W.N. 168.

[6] [1930] 1 Ch. 84.

Similarly, a married woman to whom property is bequeathed subject to a *restraint on anticipation*, may evade the restraint by disclaiming the gift in return for a sum of money paid to her by the residuary legatee.[2]

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[1] The rule in *Howe* v. *Dartmouth* is excluded on intestacy by Administration of Estates Act, 1925, s. 33 (5).

[2] *Re Wimperis*, [1914] 1 Ch. 502. See Keeton, *Law of Trusts*, pp. 34–35, and Snell's *Equity*, Ch. XXV (D), as regards restraints upon anticipation. The Law Revision Committee's fourth Interim Report recommends legislation to prevent the imposition of restraints upon anticipation by wills and settlements which come into force thereafter. (Cmd. 4770.)

CHAPTER VIII

EQUITABLE DOCTRINES

THE Court of Chancery, in the exercise of its equitable jurisdiction, formulated several important principles concerning wills. These principles are to be found in the standard textbooks on Equity,[1] but it is necessary to consider some of them in outline in this chapter.

A. CONVERSION

We have already seen[2] that a person to whom specific property is devised or bequeathed gets nothing if the property in question is destroyed or disposed of, or converted into something different before the testator dies. This is known as *ademption*, and follows from the rule that a will has no effect until the death of the testator.

Actual Conversion

Actual conversion

Such cases of ademption frequently arise through a *sale* of the specified property by the testator after making his will. Thereupon, since it is no longer his, his will becomes incapable of bestowing it upon the person to whom he attempted to devise or bequeath it. Or, if we view the matter from another angle, we may say that the testator, by selling the property, *converted his interest into money*; and that, since the gift contained in the will is a gift not of money, but of a specified article or interest in land, the gift fails because that article is not now available for the legatee or devisee.

Notional Conversion

When a testator, before his death, has actually conveyed the property to a purchaser, one may say that there has been an *actual conversion* of that property into money.

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[1] E.g. Snell's *Principles of Equity* (21st ed.), Ch. XI.

[2] *Supra*, Ch. VII, *A*.

Notional conversion.

But even before a projected sale is completed, equity considers the property to be converted, provided that there exists a binding contract to sell it. This is known as *notional conversion*, for, although the property will not be actually converted into money until completion occurs, *equity* treats the seller's interest as though it were money immediately a *binding contract of sale* arises.

(*a*) By contract to sell.

This doctrine of equity is founded upon an equitable maxim, which runs "equity considers as already done that which ought to be done." Thus, whenever a person is under a duty to sell property, equity treats his interest as though it were converted into money from the moment when the duty to sell it arises. Such a duty to sell exists (*a*) when a binding contract of sale has been made, or (*b*) when the property is transferred to trustees upon trust to sell it—for here the trustees are under a binding duty to convert the property into money. There are other cases where such a notional conversion occurs through the existence of a duty to sell;[1] but these two are the most important for our purposes.

(*b*) By creating a trust for sale.

Ademption by contract of sale.

The result of this doctrine is that if A makes a will devising his farm Blackacre to D, and shortly before he dies agrees to sell the farm to P, the devise to D is adeemed and D gets nothing. This is so because equity treats the contract of sale as an immediate conversion of A's interest in the farm into money. Hence, although, in fact, the farm forms part of A's assets at his death, D has no claim to it. Of course, A's executors must carry out his contract, and convey the farm to P as agreed; but D will get no part of the purchase money paid to them, for the will did not bequeath the money to him. Indeed, the result is substantially the same as if A had himself carried out the contract during his lifetime; for, had he conveyed the farm to P and received the purchase money himself, there would have been an *actual conversion* of his interest into money, and the devise to D would have been adeemed as before.

Contrary intention.

If, however, the testator made or confirmed his will *after* the date of contracting to sell the property this would constitute sufficient evidence of his intention to oust the equitable doctrine of notional conversion. The fact that he made or confirmed a specific devise or bequest of certain property, knowing that he had already undertaken to sell that property would clearly show that he did not intend the contract to interfere with the gift. Hence, in such a case, D would be entitled to claim from A's executors the money which P paid to them on completion of the sale.[1]

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[1] E.g. where the Court orders property to be sold, or where it becomes partnership property (and must therefore be sold eventually when the partnership is ultimately dissolved). See Snell's *Principles of Equity* (21st. ed.), Ch. XI; also *post*, p. 98, note 2.

Option to purchase.

The equitable doctrine of conversion has been extended to cases in which a testator has given someone an *option* to purchase his property;[2] for if that person exercises the option a binding contract of sale results. This is so even if the option is not exercised until after the testator's death.

Thus, in *Re Carrington* (1932),[3] a testator, having made a will bequeathing certain shares to X, gave P an option to purchase them. P paid £5 to the testator for this option, the option to be exercised within a month of the testator's death. Immediately after the testator died, P exercised the option by notifying the executors of his desire to purchase the shares. The Court of Appeal decided that this effected a conversion of the shares into money, and that in consequence the bequest to X was adeemed.

Contrary intention.

Here again, however, the doctrine does not prejudice a *specific* devisee or legatee of the property, if the will in his favour was made or confirmed by the testator *after* the date when the option was given; for in such a case the testator evidently intended the gift to take effect despite the option. In such a case, therefore, the specific devisee or legatee can claim the price paid when the option is exercised. But if (as in *Re Carrington*) there is no such evidence available, the exercise of the option will defeat the gift. Nevertheless, the gift may not be entirely valueless; for the legacy or devise is good until the option is actually exercised. Hence the legatee is entitled to any income produced by the property during the interval between the testator's death and the exercise of the option;[1] but his interest ends as soon as the option is exercised.

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[1] *Re Pyle*, [1895] 1 Ch. 724. This applies only where the devise or bequest is specific, for a general or residuary gift does not identify the particular items which the testator desires to give.

[2] *Lawes* v. *Bennett* (1785) 1 Cox. 167: an option to purchase freehold land.

[3] [1932] 1 Ch. 1. This decision further extended the doctrine of conversion; for although the doctrine already applied to options and contracts for the sale of *realty*, it did not formerly apply to options and contracts for the sale of *personalty*, e.g. shares.

Effect on residuary and general gifts.

When conversion (whether actual or notional) occurs it may lead either to the ademption of a specific gift in the manner already described, or to the diminution of a general or residuary devise.

Thus, in *Lawes* v. *Bennett* (1785),[2] which is the ancient authority upon conversion by the exercise of an option to purchase, a testator devised all his realty to D, and all his personalty to D and E. His realty included certain freehold land, and after making his will he gave to a lessee an option to purchase this land for £3000 within a fixed time. When the testator died, the lessee exercised this option, paying £3000 as agreed. Consequently, the doctrine of conversion arose, and removed this plot of land from D's general devise, at the same time adding £3000 to the general bequest of all the personalty for the benefit of D and E.

It will be observed, therefore, that when the doctrine applies it usually operates to increase the amount of *money*, as opposed to other assets, included in the testator's estate; accordingly, the doctrine favours residuary or general *legatees* at the expense either of a devisee (as in *Lawes* v. *Bennett*) or of a specific legatee (as in *Re Carrington*).

It is important, however, to remember that although the testator may himself prejudice a legatee or devisee of his property in this manner if he sells or undertakes to sell it, no such consequences result from a like sale or contract initiated by his personal representatives. If the property was not fettered at the testator's death with any duty to convert it into money, the provisions of his will are invincible. Hence, providing the estate is sufficient for the purpose, every legatee and devisee is safe; and if property devised or bequeathed by the will is sold by the executors the devisee or legatee is entitled to claim the purchase money from them in lieu of the property itself.[3]

Ademption by trust for sale.

If a testator, after making a will by which he devises land to A, conveys that land to trustees upon trust for himself, he retains an equitable interest in that land. But if, as is often the case, the land is conveyed to such trustees *upon*

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[1] *Re Marlay*, [1915] 2 Ch. 264.

[2] 1 Cox. 167.

[3] If the sale is necessary in order to meet the testator's debts, the devisee or legatee may be unable to claim the whole of the proceeds of sale; for his gift may *abate* for payment of debts as described in Chapter VII, *A*, *supra*.

trust for sale, he retains an equitable interest in the *land* only so long as it remains unsold; and when the trustees sell it, as the trust requires them to do, his equitable interest will now be in the *money* paid to them by the purchaser. Since, however, the trustees are under a *duty to sell* this property, "equity considers as already done that which ought to be done." Accordingly, his interest is deemed to be converted into money as soon as the trust for sale is created. Hence, although the trustees may be empowered to postpone the sale for many years, the fact that they hold the land upon trust for sale leads equity to regard the beneficiary as having an equitable interest in *money* from the very moment of the creation of the trust. It is only when the trustees sell that his interest will *actually* be converted into money; but the equitable doctrine of conversion treats him as having an equitable interest in money from the outset—before any sale occurs. Consequently, A, to whom he had devised the land by his will, gets nothing; for the creation of the trust for sale is considered to convert the testator's interest into a money interest, and, therefore, adeems the devise to A.

Statutory trusts for sale.

The Property Legislation of 1925 has increased the importance of this rule; for it provides that trusts for sale shall arise automatically in certain cases. For our purposes the most important of these is where land is held upon trust for two or more persons *in common.* In such a case a trust for sale automatically arises, and the land is held at once upon trust for sale on their behalf.[1] We are not concerned here with the rules which decide who are to be the trustees in such cases as this. But the fact that the Law of Property Act, 1925, converts tenants in common of an interest in land into beneficiaries under a trust for sale is of great importance; for it means that their interests are subject to the equitable doctrine of conversion, and are, therefore, treated not as interests in the land, but as interests in money.

Thus, in *Re Kempthorne* (1930),[2] a testator made a will in 1911 devising all his freehold land to his brother C, and the rest of his property to his brothers and sisters equally. He was entitled in common with certain other persons to some freehold land. But before he died, the Law of Property Act, 1925, had come into force. Consequently, this land had become subject to a trust for sale. Hence his interest in it had been converted into personalty, and the Court of Appeal decided that the devise to his brother C did not include this interest.

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[1] Law of Property Act, 1925, s. 34; and Sch. I, Part IV. An automatic trust for sale occurs also when a deceased person leaves property which he has not disposed of by his will. Administration of Estates Act, 1925, s. 33. It may occur also when a beneficial interest in land is held by co-owners *jointly*; but as the interest of a joint tenant ends with his death, this does not concern us here. See Law of Property Act, 1925, s. 36 as amended by Law of Property (Amendment) Act, 1926, Sch.

[2] [1930] 1 Ch. 268, (C.A.)

Similarly, in *Re Newman* (1930),[1] a testator made his will in 1922, devising "my share in Blackacre" to X. His share in this land was again an interest in common with other persons (or, as it is usually called, an "undivided share"). He died in 1929; and meanwhile the Law of Property Act, 1925, had imposed a trust for sale upon the land, as already described. Hence, the devise to X was adeemed, for the testator was not entitled to any share in Blackacre when he died. His interest had been converted, by the trust for sale, into personalty.[2]

Failure of Objects of Conversion

Failure of objects of a conversion directed by will.

When the doctrine of conversion arises from the will itself no untoward results are likely to occur. Thus, if a will devises land to trustees upon trust for sale for the benefit of the testator's children, the only important effect of the doctrine of conversion here is that, since these children get an interest which equity treats as personal property, when they in turn make a will, the person to whom they bequeath their *personal* property will get their interest under this trust for sale.

Rule in *Ackroyd* v. *Smithson.*

But let us suppose that freehold land is devised to trustees for sale upon trust for A and B in equal shares, and that B's interest fails—e.g. because he dies before the testator or because the testator revokes B's gift—and, therefore, falls into residue. Will B's lapsed interest be treated as real property and go to the testator's residuary devisee; or will it be personalty for the residuary legatee?[3] Here the ancient *rule in Ackroyd* v. *Smithson*[1] applies, and the residuary devisee is entitled. Conversely, a bequest of money to trustees upon trust to buy freehold land with it for A and B in equal shares, will benefit the testator's residuary legatee if either A or B loses his interest through lapse.

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[1] [1930] 2 Ch. 409; not following *Re Mellish,* [1929] 2 K.B. 82.

[2] Similar principles apply to partnership land—e.g. a shop held by partners in a grocery business. Equity assumes such partners to be tenants in common. Hence a trust for sale arises under Law of Property Act, 1925, and conversion occurs as before. See *Re Fuller's Contract,* [1933] Ch. 652.

[3] If the will devises and bequeaths the whole of the residue, real and personal, to the same individual, this problem obviously does not arise. Nor does it arise if there is no residuary gift, for then the residue goes under the intestacy rules, which are the same for real as for personal property. But this was not so before 1926, for realty went on intestacy to the heir and personalty to the next of kin; accordingly the problem was more important before 1926 than it is to-day.

This rule might be justified, perhaps, by arguing that the trust to convert does not arise until after the testator is dead, and that, therefore, the property is not converted at the moment when one has to decide who is entitled to the lapsed share. But this is not the reason upon which the rule was founded. It is based upon the doctrine that when a will directs property to be converted for the benefit of specified persons, the conversion is limited to the purposes which the will prescribes, and, therefore, does not prejudice the rights of other claimants.

One further question arises from this doctrine. We have seen that a lapsed interest in *realty* specifically devised on trust for sale goes to the residuary devisee. But what is its character when he gets it? The rule is that if, as in the above examples, the failure is *partial* only, the lapsed share is *personalty*—in his hands. But if the purposes for which the conversion is directed *wholly fail*—e.g. if the shares of both A and B lapse—it is *realty* in his hands. Here, again, the reason is that if none of the objects remain for which the conversion was directed, there is no notional conversion; but if any object of the trust for sale exists, the conversion must be carried out.[2]

Partial failure.

Entire failure.

Similarly, if money is bequeathed on trust to buy land for certain persons, a lapsed interest passes to the residuary legatee as realty if only some of the objects fail; but as personalty if the failure is complete.[3]

Methods of Evading the Doctrine

Contrary intention.

It should be remembered, however, that a testator can protect his legatees and devisees from the effects of the equitable doctrine of conversion; for if he shows clearly, by will or codicil, that he desires the legatee or devisee to get the property whatever its state may be at his death, the legatee or devisee will take his interest whether or not circumstances have arisen which lead equity to treat it as converted into something different.

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[1] (1780), 1 Bro. C.C. 503.

[2] *Re Walpole*, [1933] 1 Ch. 431, 437, approving *Re Richerson*, [1892] 1 Ch. 379.

[3] *Curteis* v. *Wormald* (1878), 10 Ch.D. 172; *Re Richerson* (*supra*), at p. 384.

Reconversion.

Moreover, a beneficiary under a trust to convert is sometimes able to free his interest entirely from the doctrine of conversion. Thus, if a person for whom trustees are holding land upon trust for sale shows clearly (whether by words or by conduct) that he desires to retain the land as land, the Court will not compel a sale; and accordingly equity will no longer regard his interest in the land as money. This process, which is known as *reconversion*, is not usually available unless the person who elects to reconvert is solely and absolutely entitled under the trust; for he is not permitted to reconvert his interest if by so doing he might prejudice the rights of other beneficiaries.[1] When, however, a beneficiary successfully effects a reconversion, his interest in the trust property resumes its natural characteristics. Hence on his death it will then devolve (under his will or intestacy) in the normal way.

B. SECRET TRUSTS

Secret trusts.

A person to whom property is devised or bequeathed is usually entitled, after the personal representatives have assented to the gift, to enjoy it for his own benefit. If the testator desires him to hold the property upon trust for other persons, the will should say so; otherwise those persons have usually no means of compelling him to recognise their claims. This rule follows from the provisions of the Wills Act, 1837, whereby testamentary dispositions must be in the form required by law. Accordingly, persons who claim that a legatee was intended to hold his legacy upon trust for them have no standing, as a rule, unless the benefits which they claim were expressed by the testator in his will.

Gifts ostensibly for the benefit of the donee.

The Court of Chancery, however, was always particularly anxious to prevent cases of fraud, and a legatee (or devisee) is, undoubtedly, fraudulent who, having obtained his legacy by promising the testator to hold it upon trust for certain persons, refuses to do so after the testator's death. It is true that he has the support of the Wills Act, 1837, for he can truthfully say that the testamentary intentions of the testator are not legally effective unless they were expressed in the form of a will. But the Court of Chancery decided that the Wills Act must not be used as a cloak for fraud. Accordingly, a person to whom a will gives property ostensibly for his own benefit will be compelled to hold it upon trust for other persons, provided that the testator during his lifetime communicated this trust to him, and that he undertook either expressly or by implication to observe it.[1]

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[1] See e.g. *Re Sturt,* [1922] 1 Ch. 416, and authorities there cited. Nor can he reconvert if an infant or of unsound mind; but in such a case the Court may do so for him.

Gifts expressed to be "on trust."

It is obvious that a legatee or devisee to whom the will gives property "on trust" cannot keep it for himself. But a difficulty may arise if the will does not state for whom he is to be trustee—i.e. to whom the real benefit of the property is to be given. One would naturally expect that the beneficiary in such a case must be the person to whom the testator has left the residue of his property—or failing him the persons entitled thereto by the intestacy rules; for we are faced again with the general rule that persons cannot claim a benefit under a will unless the will states that they are to have it. In fact, this is precisely the view which the courts take of such a case in normal circumstances. But if the donee to whom the property is left "on trust," simply, is informed *before the will is made* or *at the time of making it* that the testator desires him to hold for certain other persons, those persons can enforce the trust against him, and in these circumstances the persons entitled to the residue of the testator's property are excluded.

This was finally decided by the House of Lords in *Re Blackwell* (1929),[2] where a testator bequeathed certain property to his solicitor and others "on trust." He took the precaution of setting out the trusts upon which he desired them to hold the property in an informal written document, and showed it to the trustees (and obtained their signatures to it) before he executed the will itself. It should be noticed that this informal document was no part of his will; for it was not executed in the manner required by the Wills Act; nor did the will incorporate it by reference, for the will contained no allusion to the document in question. Indeed, the main purpose of such trusts would be defeated in normal cases were they incorporated openly in the testator's will; for the system is used as a means of providing for illegitimate relations or other persons whom the testator desires to benefit without exposing his affairs to the world at large. They are, therefore, known as "secret trusts," and, unless litigation ensues, the trustees are the only persons likely to know the destination of the property.

For a fuller treatment of this subject it is necessary to refer to the standard textbooks on the Law of Trusts.[1] The foregoing summary of the leading principles of the matter omits some of the more technical decisions in this branch of the law—e.g. the rules concerning a secret trust imposed upon a legacy bequeathed to several persons jointly or in common.

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[1] *Re Boyes* (1884), 26 Ch.D. 531; *Re Williams*, [1933] 1 Ch. 244.

[2] [1929] A.C. 318.

C. ELECTION

We have already seen that, apart from powers of appointment, a testator has no power to dispose of property by his will unless it is his to give; moreover, if he has only a limited interest in the property (e.g. a lease of land) his will can do no more than dispose of this interest.

Conditions.

If he so desires, however, a testator may attempt to persuade the owner of certain property to transfer it to another person; and this is sometimes done by bequeathing a substantial legacy to the owner of that property *upon condition* that he transfers the property to the person whom the testator wishes to have it. Such a method is not altogether satisfactory, for, although fear of losing the legacy may produce the desired result, the owner of the property may decide that he would prefer to keep his property and sacrifice the legacy—whereupon the person whom the testator desired to benefit will get nothing.[2]

Election.

A more satisfactory system has been developed by the Court of Chancery. This is known as the equitable doctrine of election. It is based upon the principle that any person who accepts a benefit under an instrument must adopt the whole of that instrument, and must renounce every right inconsistent with its provisions.[3] Thus, if a will bequeaths £100 to A, and purports also to bequeath A's motor-car to Z, A cannot claim the £100 unless he is prepared to give his motor-car to Z. He is, as it is said, "put to his election." If he decides to keep his motor-car he is said to elect *against* the will. If he is willing to give the motor-car to Z he is said to elect *for* the will, and is thereupon entitled to the legacy of £100.

Election against the instrument.

If he elects *against* the will, however, he does not necessarily forfeit the whole of the £100. The rule is merely that he must give up so much of it as will compensate Z for the loss of the motor-car. Hence, if the car is worth only £50, and A is unwilling to transfer it to Z, £50 must be paid to Z out of A's legacy, as compensation. It will be seen, therefore, that when the doctrine of election applies the position is far more satisfactory for both of the legatees than it would be had the testator attempted to secure his ends by inserting an express condition that the £100 should be paid to A only if he transfers the car to Z.[1] This is so because if such a condition had been inserted a refusal by A to give up his motor-car would have deprived him of the whole of the £100, and no part of this sum would have reached Z as compensation for his failure to obtain the motor-car.

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[1] E.g. Keeton, *Law of Trusts*, p. 48 *et seq.* See also 45 L.Q.R. 4, 282.

[2] See *post*, Chapter IX, as regards Conditions.

[3] See *Codrington* v. *Codrington* (1875), L.R., 7 H.L. 854, at p. 866; *Re Lord Chesham* (1886), 31 Ch.D., at p. 473.

Contrary intention.

Cases of election often arise because the testator mistakenly believed the property in question to be his own. But the doctrine applies irrespective of the reasons which led him to attempt to dispose of it.[2] Nevertheless, although, in fact, cases of election usually arise inadvertently, the doctrine appears to be based upon a presumption by the Courts that the testator *intends* a legatee or devisee to be "put to his election" if the will purports to give some of his property to another person. Consequently, no case for election arises if the will shows clearly that the testator did not desire to compel the legatee or devisee to elect between its two provisions. Thus, when a will bequeaths a legacy to A and attempts to bequeath A's property to Z, no case for election arises if the legacy bequeathed to A is inalienable;[3] for in this case he is precluded from electing against the will, in view of the fact that he is powerless to use the legacy as a compensation for Z.

Moreover, the Courts do not apply the doctrine if either the gift to A or the attempted gift to Z transgresses some rule of English law—such as the rule against perpetuities.[4] Nor is it applied if A's property is inalienable, for in such a case, since A is powerless to transfer the property, he could not elect for the will.[5]

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[1] Hence it is preferable not to define the doctrine of election as resting upon an *implied condition*; yet judicial definitions sometimes do so—e.g. per Lord Chelmsford, *Codrington* v. *Codrington* (*supra*), at p. 866.

[2] *Re Harris*, [1909] 2 Ch. 206.

[3] E.g. a gift to a married woman subject to a restraint upon anticipation. *Re Vardon's Trusts* (1885), 31 Ch.D. 275.

[4] *Re Nash*, [1910] 1 Ch. 1. See *post*, Ch. X, *D*.

[5] *Re Lord Chesham* (1886), 31 Ch.D. 466—e.g. quasi-heirlooms of which A is tenant for life.

Enough has been said of the doctrine of election to show that it may operate to enable a testator to dispose of property which does not belong to him, and at the same time to provide a source of compensation in case the true owner of the property is unwilling to fall in with the testator's wishes. For a more adequate treatment of this topic, the reader should refer to one of the standard textbooks upon the Principles of Equity.[1]

D. SATISFACTION

Satisfaction: (i) Of debts by legacies.

If a testator dies, having bequeathed a pecuniary legacy to someone to whom he owed a sum of money, equity presumes that the legacy was given in satisfaction of the debt.[2] Accordingly, unless evidence is available to rebut this presumption that the testator intended the legacy to pay the debt, the creditor cannot claim to be paid both the debt and the legacy. It is true that the Courts are often willing to seize upon somewhat trifling circumstances as evidence that the testator meant both debt and legacy to be paid. Thus, if the legacy is smaller or less beneficial than the debt,[3] or if the will expressly directs that debts (or debts and legacies) are to be paid,[4] the doctrine is not applied. Nor is it applicable if the testator did not incur the debt until after he had made the will in favour of the legatee; for it is obvious that the legacy could not have been inserted with the intention of meeting a debt which had not yet arisen. But the fact that the legacy is greater than the debt does not prevent the doctrine from operating.

Examples.

(*a*) Thus, if a debtor, who owes £50 to C, makes a will bequeathing £50 to him, and dies, C is entitled to claim no more than £50 from the debtor's personal representatives. Moreover, if the debt is repaid during the debtor's lifetime, C can claim nothing at all when the debtor dies.[5]

(*b*) The position would be similar if the bequest were a legacy of £60, except that C would be entitled to a further £10 beyond repayment of the debt.[1]

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[1] E.g. Snell's *Equity* (21st ed.), Ch. XIII.

[2] *Sir John Talbot* v. *Duke of Shrewsbury* (1714), Prec. Ch. 394.

[3] A legacy in satisfaction of a debt bears interest from the testator's death, *Re Rattenberry*, [1906] 1 Ch. 667. Hence the fact that the legacy need not be paid until the end of the executor's year does not make it less beneficial than the debt. *Supra*, p. 78.

[4] *Chancey's Case* (1717), 1 P.Wms. 408; *Re Huish* (1889), 43 Ch.D. 260.

[5] *Re Fletcher* (1888), 38 Ch.D. 373.

(*c*) But if the legacy consisted of a sum of £40, it would be too small to satisfy the debt; C would therefore be entitled in this case to both debt and legacy—viz. £90. It will thus be seen that when the doctrine applies, a large legacy is sometimes less advantageous than a smaller one.[2] Similarly, if the will, instead of bequeathing to him a money legacy had devised land to him, or had given him something else substantially different in character from the money owed to him, this would usually suffice to show that the testator did not intend the gift to satisfy the debt, and thereupon he would be entitled to claim both.[3]

(ii) Ademption of legacies by portions.

As a general rule, the fact that a testator has made substantial gifts to a person during his lifetime does not prevent that person from claiming any additional benefits which the testator's will confers upon him. An exception exists, however, where the testator is the father of such a person, or is *in loco parentis* to him. In such cases as this, equity is anxious to ensure that he does not obtain a double portion from the testator at the expense of other persons whom the testator is morally bound to support—i.e. his other children and other persons as to whom he has placed himself *in loco parentis.* Consequently, if a testator bequeaths a legacy or share of residue to one of his children, and *after* making the will makes a substantial gift to him (e.g. to set him up in business or as a marriage settlement), the Courts treat this gift as a portion and presume that it was an advance out of the legacy. Hence, the legacy will be diminished by the amount of the gift unless evidence can be produced to show that the testator intended the contrary.[4]

It will be noticed that this doctrine operates to extinguish legacies (either wholly or in part). Thus, its effect is somewhat similar to the destruction of a legacy by ademption;[5] consequently it is usually known as the "*equitable* doctrine of ademption" in order to distinguish it from the former. It should be observed, moreover, that the Courts do not recognise trifling gifts as portions. Accordingly, the doctrine operates only when the gift is substantial and is clearly designed for the child's support. Furthermore, the doctrine only affects the testator's children (not e.g. grandchildren) or persons to whom he is *in loco parentis*. Hence, other legacies are neither prejudiced nor benefited by the doctrine.

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[1] It is assumed in (*a*) and (*b*) that no evidence of intention is available to rebut the presumption of satisfaction.

[2] This curious result may occur also as a consequence of the rules which decide in what order legacies and devises abate for the payment of testator's debts—*supra,* Ch. VII, *A.* Thus a large pecuniary legacy is sometimes less advantageous than a small specific legacy; for the former is liable to be exhausted for payment of debts before specific legacies are affected.

[3] E.g. *Eastwood* v. *Vinke* (1731), 2 P.Wms. 614.

[4] *Pym* v. *Lockyer* (1840), 5 My. & Cr. 29; *Re Scott,* [1903] 1 Ch. 1.

[5] *Supra,* Ch. VII, *A.*

Illustration.

Thus, if a will directs that the testator's property be divided into three equal parts, and bequeaths one share to each of his two children, A and B, and the remaining share to his nephew N, the doctrine will neither increase nor diminish N's share—unless indeed the testator had placed himself *in loco parentis* to N by assuming a duty to provide for him. Hence, if after making the will the testator gives portions of £2000 to A and N respectively, this in no wise affects N's legacy—assuming he was not *in loco parentis* to N. But both A and B will be affected, being children of the testator; for the equitable doctrine of ademption will operate to procure equality between them, unless it is clear that the testator desired A to obtain a greater benefit than B. If, therefore, the testator's estate at his death is worth £9000, N will take his third share (£3000) in addition to the portion which he has already received But A's share will be reduced to £2000, and B's increased to £4000, in order to make allowance for the fact that A has received a portion already, and to produce equality between them.

Portions and intestacy.

A similar rule applies when a person dies intestate, having given a portion to one or more of his children during his lifetime. Section 47 of the Administration of Estates Act, 1925, enacts that such portions must be brought into account when estimating what shares of the intestate's property are to be paid to his children or to persons claiming under them.

The equitable doctrines of satisfaction and ademption are thus able to reduce the amount payable to a legatee either because his legacy is taken to include the repayment of debts owing to him, or because he has received portion-gifts from the testator during his lifetime.[1] The limits of these doctrines, which are somewhat intricate, are to be found in the standard textbooks on the Principles of Equity ;[2] and the reader is advised to refer to these sources for a more adequate survey of the subject.

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[1] If he is a child of the testator (or testator is *in loco parentis* to him), and testator *covenanted* to pay a "portion" to him, even a legacy of a smaller amount may satisfy this "portion-debt" *pro tanto*. As we have seen, the rule is otherwise for ordinary debts.

[2] E.g. Snell's *Principles of Equity* (21st. ed.), Ch. XV.

CHAPTER IX

CONDITIONS

Conditions, precedent and subsequent.

If words are added to a devise or bequest which show that the testator intended the gift to be ineffective unless and until some specified event (e.g. marriage) occurs, the gift is said to be *contingent* upon the happening of this event; and the enabling event is called a *condition precedent*. On the other hand, if a devise or bequest contains words which show that the testator desired the donee's interest to terminate prematurely on the happening of a certain contingency, it is said to be subject to a *condition subsequent*. Thus, it may be said that whereas the happening of a condition precedent is the signal that a gift which was originally contingent has developed into a certainty, the happening of a condition subsequent signifies that an interest has come to an untimely end.[1]

Example.

Thus, if property is bequeathed to trustees "upon trust for A, but if B marries then for B" the marriage of B is a contingency which, if it happens, will destroy A's interest. Hence, from A's point of view the contingency is a condition subsequent. At the same time, however, the marriage of B is the event on the happening of which an interest in the property is to mature for B. Accordingly from B's point of view the contingency is a condition precedent, and his interest is a contingent interest.

Conditions Precedent

Conditions precedent and contingent gifts.

It is necessary to remember, however, that an interest is not necessarily contingent merely because it is a future interest. There is nothing contingent in a gift "to B in ten years' time," or "to B after the death of A," for in each case B's interest is merely postponed until a specified period has elapsed. A contingent gift is one which is to mature only on the happening of an event which *may never happen at all*

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[1] Although as a rule a condition subsequent automatically destroys a testamentary gift, it appears that the gift merely becomes voidable (till action or entry by the person next entitled) if there is no express gift over on breach of the condition: *Re Evans, Contract*, [1920] 2 Ch. 469. But for the sake of simplicity we shall ignore this technical point throughout this chapter, and assume an automatic destruction in each case; for an express gift over is nearly always inserted.

—for events which are bound to happen are not contingencies, nor are they conditions precedent. Thus, a gift *to X if he pass a certain examination*, or a gift *to X if he marry*, is a true contingent gift; for one cannot be certain that he will ever pass the examination, or will ever marry.

Vested interests.

When there is no condition precedent attached to a gift it is said to be *vested*. A vested interest is, therefore, the converse of a contingent interest. Thus, a simple bequest of property *to B* or *to B for life* gives B a vested interest in that property. Moreover, since, as we have seen, the mere postponement of an interest does not render it contingent, a bequest *to X for life remainder to B*, or *to X for life remainder to B for life remainder to C*, confers a vested interest upon each person named in the bequest; for there is nothing here to make any of their interests contingent upon the happening of some event which may never happen at all. Furthermore, a contingent interest will itself become a vested interest if and when the specified contingency happens. Thus, a devise or bequest *to B if he marry*, or *to A for life remainder to B if he marry*, or *to A but if B marry then to B*, gives B a contingent interest so long as he remains unmarried; but if and when he marries, his interest immediately becomes a vested interest, for it is no longer conditional upon the happening of some uncertain future event. Indeed, if B is already married when the testator dies, his interest is vested from the very start, for it will be remembered that a will confers no interests until the death of the testator.

Comparative advantages of contingent and vested interests.

Although, as a rule, any interest in property can be sold or mortgaged, whether it be vested or contingent, a person who has a vested interest will probably be able to raise money upon it far more easily than will a person whose interest is contingent—and, consequently, uncertain. Every *future* interest, however, is naturally of less immediate value than it would be if it were an interest in possession; for, whereas a present interest in possession entitles one to the produce of the property concerned, a future interest does not. Thus, if land has been devised *to A for life remainder to B*, the whole of the income derived from the property after the death of the testator is payable to A so long as he lives, and B (or any purchaser from him) can claim nothing from the land until A dies. Evidently, therefore, a vested interest *in possession* is of more immediate value than a vested *future* interest, though the latter will eventually be equally remunerative (e.g. after the death of A). A contingent interest, on the other hand, is of doubtful value, unless and until the contingency occurs—thereby converting it into a vested interest. But when it becomes a vested interest its owner is qualified to take the produce of the property so soon as his interest becomes an interest in possession. Thus, if a testator dies having devised land *to B if and when he reach* 21 *years of age*, B is entitled to the income from the land immediately he comes of age—for he then has a vested interest in possession.[1] If, however, the devise was *to A for life remainder to B if and when he reach* 21, B's interest again becomes vested when he comes of age; but his interest remains a mere future interest so long as A lives, consequently he can claim no income from the property until the death of A.

Conditions are sometimes attached to gifts of property in an attempt to control the conduct of the donee, or in order to reward a person if he has behaved according to the testator's wishes. Thus, in a recent Irish case the testator left property to his brother on condition that the testator was not put into a lunatic asylum. Accordingly, on proof that the testator's brother had allowed him to be taken to a lunatic asylum, it was held that this gift to the brother failed.[2]

Conditions precedent impossible of fulfilment.

Sometimes, however, testators impose a condition precedent which is *impossible* of fulfilment, or which the donee cannot possibly obey. In such cases as this the position depends upon whether the gift is a gift of real property, or one of personal property. If it is a devise of *real property*, the gift can never take effect unless the condition precedent is fulfilled. Hence, in every case where a condition precedent is not observed, whether because the condition is impossible or because the donee declines to comply with it, the gift fails. If, however, the condition precedent is attached to a bequest of *personal property*, the condition will be ignored if it is either impossible *ab initio* or becomes impossible through the testator's own conduct. In such cases, therefore, the

(i) Realty.

(ii) Personalty

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[1] The income may be used for his maintenance during his minority, by virtue of Trustee Act, 1925, s. 31, provided that the will does not expressly dispose of the intermediate income. Law of Property Act, 1925, s. 175.

[2] *McKee* v. *Archbold*, [1933] N.I. 47.

gift is absolute. But if the condition, though possible at the outset, becomes impossible subsequently through some cause other than the testator's own act, the condition is effective, and the bequest therefore fails.

A coal merchant devised a *freehold* coal wharf to his nephews on condition that they carry on his coal business (which he also purported to bequeath to them) for five years to the satisfaction of his trustees. He sold the business before he died. Hence, *by his own act* it was impossible for them to fulfil the condition precedent. Nevertheless their claim to the wharf failed, for it was *realty* (*Re Turton* (1926)).[1] Had the gift been a legacy of personal property (e.g. £10,000) the condition would have been discharged by this impossibility, and they would have been entitled to the legacy.[2]

A testator bequeathed his residuary personalty to his brother, on condition that the brother established a claim to an undivided share of certain settled land. Before the will was made this condition had become impossible, by reason of the Law of Property Act, 1925.[3] Hence, since the gift was of *personalty*, the condition (being impossible *ab initio*) was invalid, and the gift was therefore good. *Re Thomas's Will Trusts* (1930).[4]

Illegal conditions precedent.

(i) Prohibited by law.

(ii) Impolitic.

If a testator attempts to impose upon a devise or bequest a condition precedent which encourages the commission of some act *forbidden by law*, the condition is void. Thus, a devise or bequest *to B if he murder C* is altogether illegal and ineffective. Similarly, if a condition precedent is *contrary to public policy* the condition is void. But it is sometimes difficult to decide what is, and what is not, contrary to public policy in the eye of the law.[5] Thus, a condition that the devisee acquire a peerage has been held invalid;[6] whereas a condition that he acquire a baronetcy is good, for the public is not directly affected by the bestowal of an honour which gives the recipient no share in the government of the realm.[7] Moreover, a condition is contrary to public policy if it is inconsistent with parental duties—e.g. if it prescribes that a child shall adhere to a certain religious sect, or that he shall not be under the control of his father.[1] And the same applies if the condition encourages parent and child[2] or husband and wife to live apart,[3] or if it attempts to prevent the donee from ever marrying,[4] or precludes him from instituting any legal proceedings whatever concerning the testator's estate.[5]

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[1] [1926] 1 Ch. 96.

[2] *Darley* v. *Langworthy* (1774), 3 Bro. P.C. 359; *Walker* v. *Walker* (1860), 2 D.F. & J. 255.

[3] S. 35, and Sch. I, Pt. IV—whereby land is automatically held *on trust for sale* if persons are beneficially interested in undivided shares: consequently their interests are really in money (the proceeds of sale), not in land; for the equitable doctrine of conversion applies.

[4] [1930] 2 Ch. 67.

[5] "At different times very different views have been ascertained as to what is injurious to the public": per Swinton Eady, J., *Re Beard*, [1908] 1 Ch. 383, 386.

[6] *Egerton* v. *Brownlow* (1853), 4 H.L.C. 1.

[7] *Re Wallace*, [1920] 2 Ch. 274, (C.A.).

Effect of illegal conditions precedent.

But here, again, there is a difference between testamentary gifts of real property and those of personal property. If a condition precedent attached to a devise of *real property* is illegal, as above described, the devise is void also. A bequest of *personalty*, on the other hand, is good if a condition precedent attached to it fails through illegality, unless the condition encourages the commission of an illegal act which is *malum in se* (e.g. "to B if he murder C"), in which case both condition and legacy are void.

Remoteness.

In one respect, however, contingent gifts whether of real or personal property are similar. The law has evolved a rule, known as "the rule against perpetuities," calculated to invalidate any condition precedent which may postpone the vesting of an interest for an inordinate length of time. If this rule is infringed both the condition and the gift to which it is attached are void. We shall consider this rule more fully in the next chapter.

Conditions Subsequent

Conditions subsequent, and gifts "vested subject to be divested."

As we have already seen, a condition subsequent is a condition the happening of which brings an interest in property to a premature end. Thus, a gift *to A but if B marry then to B* gives an interest to A which is absolute unless B marries; and the marriage of B is, from A's point of view, a condition subsequent which will destroy A's interest. An interest of this type is usually described as one which is "vested subject to be divested," for, although A has a vested interest at the outset, it will be taken from him if the condition subsequent (in the shape of B's marriage) occurs.

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[1] *Re Borwick*, [1933] 1 Ch. 657; *Re Sandbrook*, [1912] 2 Ch. 471; both conditions subsequent.

[2] *Re Boulter*, [1922] 1 Ch. 75.

[3] *Re Moore* (1888), 39 Ch.D. 116; cf. *Re Lovell*, [1920] 1 Ch. 122.

[4] *Jones* v. *Jones* (1876) 1 Q.B.D. 279; *Re Hewett*, [1918] 1 Ch. 458; *Re Lanyon*, [1927] 2 Ch. 264.

[5] *Re Williams*, [1912] 1 Ch. 399.

Impossible, illegal and remote conditions subsequent.

A condition subsequent is void if it is impossible, or contrary to public policy, or if it is forbidden by law. In each of these cases the result is that the interest to which the void condition subsequent was attached remains; indeed, the result is precisely the same as if the condition had never been inserted. This is the rule whether the property concerned is realty or personalty.[1] And it applies equally if the condition is void through infringing the rule against perpetuities.[2] Consequently, if a condition subsequent is void, the devise or bequest to which it is attached becomes absolute—or as it is sometimes called "indefeasibly vested."

Effective conditions subsequent.

On the other hand, if there is nothing impossible, illegal, or impolitic about a condition subsequent, a breach of the condition will effectively determine the legacy or devise which it concerns.

Examples.

Thus, property is sometimes devised on condition that the donee continue to use a certain name and arms; and failure to obey this provision will normally lead to the loss of the gift. But in *Re Hind* (1933)[3] it was held that owing to the peculiar facts of that case the "name and arms" clause was void, being inconsistent with a certain section of the Settled Land Act, 1925.[4] Accordingly the donee's interest remained in force whether he used the specified name and arms or not.

Another condition subsequent which testators sometimes include in a will is a clause stating that any legacy is to be forfeited if the legatee does not claim it within a certain time. There is nothing manifestly impossible or unlawful in a condition of this kind. Hence a legatee who fails to claim within the time prescribed loses his legacy, even if his failure to claim it was due to his ignorance of the fact that the testator had died leaving a will in his favour.[5]

Other Causes of Invalidity

Other causes of invalidity:

Conditions may be held void by law for several other causes than those which we have already mentioned. Thus, it is obviously desirable that a condition should be reasonably clear and certain, in order that the Court can decide at any moment whether the condition has or has not been fulfilled. Hence, a condition is *void for uncertainty* if it is unduly vague[1] or specifies some contingency the happening of which it is practically impossible to detect.[2] But perhaps the most important of these for our purposes are conditions which are *repugnant* to the estate or interest to which they are annexed, and conditions *in terrorem.* Such conditions are usually conditions subsequent; it is therefore convenient to discuss them at this point.

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[1] *Re Beard*, [1908] 1 Ch. 383.

[2] *Re Da Costa*, [1912] 1 Ch. 337.

[3] [1933] 1 Ch. 208.

[4] The point turned upon Settled Land Act, 1925, s. 36 (6).

[5] *Re Lewis*, [1904] 2 Ch. 656.

Uncertainty.

Repugnancy.

The law considers that certain interests in property must, of their very nature, confer upon anyone to whom they belong the right to do certain things. Accordingly, if a testator gives to a person such an interest in property, and at the same time, by imposing a condition upon the gift, attempts to deprive him of a right which the law considers to be an essential characteristic of that interest, the condition is void —being *repugnant* to the estate or interest in question. On this ground it has been held that a condition is repugnant and void if it prohibits the owner of an entailed interest from barring the entail,[3] or provides that an absolute interest in personalty,[4] or a fee simple interest in real property[5] will be forfeited if its owner voluntarily attempts to alienate it (e.g. by sale or mortgage),[6] or alienates it involuntarily (e.g. by becoming bankrupt).[7]

Determinable interests.

The doctrine of repugnancy is, however, too complicated a subject to receive detailed treatment in a textbook of this size, and those who desire to pursue it further should, therefore, refer to the standard works on the subject.[8] But it should be noticed, in passing, that a gift "to X *until* he attempts to alienate or becomes bankrupt" is unaffected by the doctrine; for in this case the words used merely state how great an interest is given, accordingly they cannot be repugnant to or inconsistent with the gift.[9] Moreover, it is

Married woman

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[1] *Re Reich* (1924), 40 T.L.R. 398. *Re Sandbrook,* [1912] 2 Ch. 471.

[2] *Re Moore,* [1901] 1 Ch. 936; cf. *Re Hanlon,* [1933] 1 Ch. 254.

[3] *Dawkins* v. *Lord Penrhyn* (1878), 4 A.C. 51.

[4] *Bradley* v. *Peixoto* (1797), 3 Ves. 324.

[5] *Re Dugdale* (1888), 38 Ch.D. 176; *Re Cockerill,* [1929] 2 Ch. 131.

[6] According to *Re Macleay* (1875), 20 Eq. 186, a limited restraint on alienating a fee simple estate is sometimes valid; but see *Re Rosher* (1884), 26 Ch.D. 801, and *Re Cockerill* (*supra*).

[7] *Re Smith,* [1916] 1 Ch. 369; but see *Re Forder,* [1927] 2 Ch. (C.A.) 291, as to reversionary interests in personalty.

[8] E.g. Theobald on *Wills* (8th ed.), 710 *et seq.*

[9] *Brandon* v. *Robinson* (1811), 18 Ves. 429—but a gift over appears to be essential in such cases.

restrained from anticipation.

important to remember that the Courts of equity showed special favour to married women; consequently, gifts of property to trustees upon trust for a woman may validly provide that she cannot dispose of her interest during her married life.[1] An outstanding advantage of such a provision is that it preserves her property for her in case her husband attempts to persuade her to hand over her property or its proceeds to him; but it has other advantages also.[2] It is usually achieved by inserting in the gift some such phrase as "without power of anticipation."

Conditions attached to personalty *in terrorem*:

Conditional gifts are usually accompanied by a gift over to someone else in case the condition is broken. But such a *gift over* is not as a rule essential; for if a gift fails through breach of condition that gift is ineffective, and the property therefore returns to or remains in the donor. Consequently, where a devise or bequest fails through breach of condition, and there is no express gift over, the property comprised in it will pass to the persons entitled to the residue of the testator's property—whether by virtue of a residuary gift, or by the intestacy rules.[3]

There are two cases, however, in which an express gift over is practically essential. We have already seen that a condition is wholly void if it attempts to prevent a person from ever marrying, or from instituting any litigation whatever concerning the testator's estate. Nevertheless, a condition in *partial* restraint of marriage (e.g. not to marry a domestic servant, or not to marry a second time, or not to marry without consent[4]) is usually valid. So also is a condition that legatees or devisees shall not dispute the testator's will (e.g. by falsely alleging that he was insane when he made it)[5]—though even here they cannot be penalised if they dispute the will successfully, for to hold otherwise would be clearly contrary to public policy. Even in these two cases, however, no gift over is necessary when such conditions are attached to devises of real property.

(i) Partial restraint of marriage.

(ii) Not to dispute a will.

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[1] *Brandon* v. *Robinson* (1811), 18 Ves. 429.

[2] E.g. as against her creditors: see Snell's *Principles of Equity* (21st ed.), Ch. XXV, *D* (also *supra*, p. 92, note 2).

[3] *Re Evans's Contract*, [1920] 2 Ch. 469.

[4] *Jenner* v. *Turner* (1880), 16 Ch.D. 188; *Allen* v. *Jackson* (1876), 1 Ch.D. 399; *Re Whiting's Settlement*, [1905] 1 Ch. 96.

[5] *Cleaver* v. *Spurling* (1729), 2 P. Wms. 526.

But if a condition against disputing a will, or in partial restraint of marriage, is attached to a bequest either of *personal property* or of a *mixed fund* representing personal property and the proceeds of sale of real estate, the condition is void if it appears to have been inserted *in terrorem*—i.e. as a mere threat. If, however, the will contains an express gift over to someone else on breach of the condition,[1] the Court usually considers this sufficient evidence that the condition was not *in terrorem*; for the presence of a gift over shows that the testator inserted the contingency in order to fix a possible benefit for the second person, and not simply to coerce the original donee.

Thus, in *Re Hanlon* (1933),[2] a testator died, having bequeathed his real and personal property to trustees upon trust to sell the real property and to hold the proceeds of sale, together with his personal property, on trust (*inter alia*) for B and C in equal shares. B's interest, however, was to be forfeited if B should cohabit with, commit misconduct with, or marry Z, or leave home with the intention of doing so. The trustees applied to the Court to ascertain whether or not this condition was valid. Eve, J., held as follows—

(i) The condition was not void for *uncertainty*; for it made perfectly clear what events would cause a forfeiture; and if any of those events occurred there would be no undue difficulty in proving it.

(ii) Although there was no gift over on breach of condition, the condition was not wholly void on that account. Admittedly the doctrine of *in terrorem* applies to a mixed fund, of the type here concerned; yet it applies only to conditions relating to *marriage*, or disputing a will. The present condition concerned events other than marriage (e.g. misconduct and cohabitation), and was therefore valid to that extent, and would remain so until either B or Z died.

(iii) Hence the trustees could not safely hand over to B the *capital* value of B's share of the residue; and it made no difference that B was most unlikely to do any of the forbidden acts.

(iv) But, of course, the people who would be entitled to B's share in the event of forfeiture could, if they wished, agree to forego their rights in B's favour. And if they were willing to do so (e.g. in return for money paid to them by B) B's interest would become absolute, and the trustees could then hand over B's share at once.

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[1] *Re Whiting's Settlement*, [1905] 1 Ch. 96; *Bellairs* v. *Bellairs* (1874), L.R. 18 Eq. 510. Or an *express* direction that on breach of condition the interest shall fall into residue—*Re Bathe*, [1925] Ch. 377.

[2] [1933] 1 Ch. 254.

CHAPTER X

RULES AGAINST REMOTENESS

THE English law confers upon property owners very wide powers of disposing of their interests. But at the same time it seeks to prevent them from settling property in such a fashion as will make its devolution unduly complicated or uncertain. Unfortunately, the rules which the Courts evolved for this purpose themselves became somewhat involved and uncertain. They have, therefore, been simplified to some extent by recent legislation.

A. RULE AGAINST ABEYANCE OF THE SEISIN

Rules abolished:

(1) Abeyance of the seisin.

Before 1926 it was possible to create successive *legal* interests in real property, by granting a string of limited interests to persons in succession—e.g. "To Albert for life, remainder to Bertram for life, remainder to Charles in fee simple." The remainder to Bertram in this example is *vested* (as also is that of Charles), for it is not conditional on the happening of some uncertain event. Hence, there is no doubt that, when Albert's interest ceases at his death, Bertram is qualified to take possession of the land at once. But if Bertram's remainder were *contingent* (e.g. upon his marriage) the position would be different—e.g. "To Albert for life, remainder to Bertram, *if he marry*, for life, remainder to Charles in fee simple." Here, if Albert died whilst Bertram was still unmarried, Bertram was not yet qualified to take possession. No one was entitled under the grant to hold the land until Bertram's marriage: the Courts, therefore, held that Bertram's interest was void, for the law would not allow an "abeyance of the Seisin." Hence, Charles, the next remainderman, became immediately entitled at Albert's death, unless Bertram had already married and thus had acquired a vested interest before the termination of Albert's prior life estate. The rule, therefore, was that a legal contingent remainder became void as soon as the previous estate ended, unless in the meantime it had become vested.[1]

This rule, however, never applied to *equitable* contingent remainders—i.e. to cases where the land was held by trustees upon trust for the persons concerned. In these cases *the trustees hold the land*—e.g. upon trust for Albert for life, remainder for Bertram if he marry for life, remainder for Charles in fee simple. Consequently, the land will not be left untenanted if Albert dies before Bertram has married; and, therefore, Bertram's life interest may yet mature, although he does not marry until many years after Albert's death.

Since the Law of Property Act, 1925, section 1, all remainders must be equitable, with the legal ownership vested in trustees upon trust for the persons concerned. Hence, the above rule is now obsolete. Indeed, it had been obsolete since 1897 as regards remainders created by *will*, for the Land Transfer Act, 1897,[2] enacted that on the death of a testator all his real property passes to his personal representative, who hold it (subject to payment of debts, etc.) on behalf of the persons to whom he devised it by his will. All devises therefore (including any contingent remainder—such as Bertram's) became equitable in origin and therefore escaped the rule.[3]

B. RULE IN *WHITBY* v. *MITCHELL*

(ii) Double possibilities, and the rule in *Whitby* v. *Mitchell.*

At one time it was thought that every contingent remainder which involved a double contingency was necessarily void. In 1910, however, the Court of Appeal finally decided that no such general rule ever existed.[4] Nevertheless, as was decided in the leading case of *Whitby* v. *Mitchell*,[5] there was certainly one kind of double possibility which the law disallowed, and which would invalidate any contingent remainder, whether legal or equitable,[2] to which it was attached. If an interest for life was limited to an unborn person, and was followed by a remainder to that person's children, this gift to the unborn person's child or children was void. Hence, a devise *To A (a bachelor) for life, remainder to his first son for life, remainder to that son's first son in fee simple,* was good only in part; for the final remainder, being a gift to the unborn child of an unborn person, infringed this rule in *Whitby* v. *Mitchell,* and was therefore void.[1]

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[1] The severity of this rule was removed to some extent by the Contingent Remainders Act, 1877, which provided in effect that the remainder would not become void through failure to vest in time, unless by so construing it the perpetuity rule would be infringed—see *post,* section D.

[2] Ss. 1, 2, 3.

[3] *Re Robson,* [1916] 1 Ch. 116.

[4] *Re Nash,* [1910] 1 Ch. 1, (C.A.)

[5] (1890), 44 Ch.D. 85.

The rule in *Whitby* v. *Mitchell* remained in force until the end of 1925. It never applied to interests in personal property,[2] but it extended to all interests in real property created before 1926. It was then abolished by section 161 of the Law of Property Act, 1925. The section runs as follows: "The rule of law prohibiting the limitation after a life interest to an unborn person, of an interest in land to the unborn child or other issue of an unborn person is hereby abolished, but without prejudice to any other rule relating to perpetuities."

Doctrine of *cy près* or approximation.

Even before 1926, however, the Courts sometimes allowed a gift *by will* to evade the rule in *Whitby* v. *Mitchell.* This evasion occurred only if the guilty remainder to the child or children of an unborn person was an *entailed interest*; e.g. *To A (a bachelor) for life, remainder to his first son for life, remainder to that son's children successively in tail.* In a case of this kind the Court would construe the gift as a devise *to A for life, remainder to his first son in tail*; the reason being that this latter construction would be likely to produce approximately the result which the testator had intended, since the son's entailed interest would, when he died, pass automatically to the heirs of his body—thereby enabling his children to benefit from the gift.[3] This construction, moreover, since it contained no direct gift to the unborn children of an unborn person, was unaffected by the rule in *Whitby* v. *Mitchell.*[4] In recent years, however, the Courts have been prone to discover reasons why such alternative constructions do not comply with the testators' evident intentions,[1] whether because the gift as altered would benefit persons outside the original devise, or because it would exclude persons whom the testator sought to benefit. Consequently, the *cy près* doctrine has seldom been applied by the Courts during the present century.

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[1] It also infringes the perpetuity rule (*post,* Section *D*), unless words are added to ensure that the son's son shall take only if born within 21 years after lives in being—e.g. "provided that the said son's son be born within 21 years after the death of A": See *Re Nash,* [1910] 1 Ch. (C.A.) 1.

[2] *Re Bowles,* [1902] 2 Ch. 650.

[3] *Humberston* v. *Humberston* (1716), 1 P.Wms. 332; *Vanderplank* v. *King* (1843), 3 Hare 1; *Re Hobbs,* [1917] 1 Ch. (C.A.) 569. But of course, the son might disinherit his children by barring the entail.

[4] It also evaded the rule against perpetuities—cf. note 1, *supra.*

One would naturally expect to find that the *cy près* doctrine was abolished by the Law of Property Act, 1925, in view of the fact that the Act so clearly destroyed the rule in *Whitby* v. *Mitchell*, with which it was associated. Nevertheless, the matter is not entirely free from doubt. Section 130 (1) enacts that entailed interests cannot now be created except by using expressions which were capable of creating an estate tail if used in a *deed* before 1926. Evidently, therefore, the *cy près* doctrine cannot now operate to create an entailed interest, for it never applied to grants by deed. Section 130 (2) deals with the modern effect of expressions which would have created an estate tail if used in a will before the Act, but which cannot do so now. It provides that these expressions shall operate in regard to property real or personal, to create absolute, fee simple or other interests corresponding to those which, if the property affected had been *personal estate*, would have been created therein by similar expressions *before the commencement of this Act*.

The *cy près* doctrine did not apply to *personal estate*;[2] nor could personalty be entailed before 1926.[3] It therefore seems that the modern effect of a devise *To the first son of A (a bachelor) for life, remainder to that son's children successively in tail* is to give A's son a life estate only.[4]

C. RULE AGAINST INALIENABILITY

Existing rules:
(i) Perpetually inalienable interests.

We have already seen, in the previous chapter, that a condition which purports to make a fee simple or absolute interest *inalienable* is void, and that the reason usually given as the basis of this rule is that such a condition is repugnant to the nature of the interest to which it is annexed. This aspect of the doctrine of repugnancy is sometimes loosely described as prohibiting the creation of a *perpetuity*—by which it is meant that the rule prevents property from being bound inalienably to some particular person or purpose. Examples of the application of this rule are chiefly to be found in the law of trusts. Thus, if property is bequeathed to trustees upon trust to hold it for ever for some specified purpose, the trust tends to create a perpetuity, and is therefore usually void. Trusts for *charitable* purposes are exceptional; but if the purpose is non-charitable, the trust is invalid unless its terms permit the whole of the trust property to be distributed at once.[1]

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[1] E.g. *Monypenny* v. *Dering* (1852), 2 De G. M. & G. 145; *Re Mortimer*, [1905] 2 Ch. 502.

[2] *Routledge* v. *Dorril* (1794), 2 Ves. Jun. 357; *Boughton* v. *James* (1844), 1 Coll. 26, 44; (1848), 1 H.L.C. 406.

[3] *Leventhorpe* v. *Ashbie* (1635), 1 Roll. Abr. 831. *Semble*, this was why the doctrine was not applied to personalty; *Routledge* v. *Dorril* (*supra*).

[4] The ultimate remainder is void as infringing the perpetuity rule. But if restricted to the proper period (*supra*, p. 118, n. 1) it would seem by subsec. (2) to give the children a fee simple—assuming that before 1926 the limitation would have given them absolute interests had it been a bequest of personalty. By subsection (1), however, it appears to give them an entailed interest.

Thus, in *Re Gwyon* (1930),[2] a clergyman had devised and bequeathed the whole of his residuary estate upon trust to use the annual income therefrom for providing knickers every year for boys resident in certain parts of Surrey. This was not a charitable trust, as defined by law. It was not, for instance, restricted to poor children. Hence, since it was designed to last for ever, the trust failed for remoteness.

On several occasions judges have stated that provisions of this kind are valid if the property is certain to become freely alienable within the period of lives in being together with twenty-one years thereafter.[3] The idea appears to have been suggested by the fact that this period is prescribed by the "rule against perpetuities"—an independent rule which we shall examine in the following section of this chapter.

Meanings of "perpetuity."

More detailed treatment of this rule against inalienability should be sought in the standard textbooks upon the Law of Trusts, since its main concern is with trusts for non-charitable purposes. The chief reason for mentioning the topic here is in order to demonstrate that the word "perpetuity" is sometimes used as descriptive of attempts to render property inalienable—e.g. to make a gift or trust in terms which prevent or fetter the free disposition of the property. This use of the word, however, is somewhat unfortunate; for it tends to confuse the rule against inalienability with the modern "rule against perpetuities"—a rule which is quite distinct from the rule against inalienability, and which is directed against a very different evil.

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[1] *Re Chardon,* [1928] 1 Ch. 464; *Re Patten,* [1929] 2 Ch. 276; *Re Prevost,* [1930] 2 Ch. 383. See Keeton, *Law of Trusts,* Ch. VIII, for charitable trusts.

[2] [1930] 1 Ch. 255.

[3] E.g. *Thellusson* v. *Woodford* (1805), 11 Ves. 112; *Re Dean* (1889), 41 Ch.D. 552, 557. The latter is an unsatisfactory decision. The learned judge, having thus stated the rule, appears to have ignored it when deciding the question before him. The former, however, and subsequent decisions concerned directions to accumulate the income of property for longer than lives in being and 21 years, suggest that this period is properly applicable to restraints on alienation (as well as to the rule against perpetuities).

D. THE RULE AGAINST PERPETUITIES

(ii) Rule against perpetuities.

The rule against perpetuities aims at preventing the undue postponement of a gift. Its object is to ensure that a donee will attain a vested interest without undue delay, not that the interest in question will be alienable when he gets it. To this end the rule prescribes a certain fixed period—often known as the "perpetuity period"—and provides that every future interest is void *ab initio* unless one can be absolutely certain at the outset that it cannot vest later than the limits of this period. The period allowed by the rule is that *of a life or lives in being when the instrument which creates the interest comes into force, together with twenty-one years thereafter.*[1]

Examples.

1. Thus a devise or bequest to A, *a living person*, does not infringe the perpetuity rule even though it be contingent upon his reaching some phenomenal age (such as 100 years of age) or upon any other event which must happen, if it happens at all, during his lifetime (e.g. upon his passing some examination, or upon his marriage, or swimming the Channel). For the rule only attacks contingencies which may occur *after* the expiration of lives in being and twenty-one years.

2. Similarly a simple devise or bequest to the children of B (a living person) does not offend the rule. Even if B has no children when the testator dies, so that the gift is necessarily contingent upon the birth of children to him, this is a contingency which must occur, if it occurs at all, during B's lifetime. The gift is therefore good—with twenty-one years to spare.

3. Similarly a devise or bequest *to such of the children of B* (a bachelor, alive at the testator's death) *as reach twenty-one years of age*, is within the rule. Here, again, we know that B's children, if he ever has any, must be born (or at least conceived)

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[1] *Cadell* v. *Palmer* (1833), 1 Cl. & F. (H.L.) 372. The period of *gestation* may be added where gestation exists. Moreover if no appropriate lives in being are available, the period is merely twenty-one years from the date when the instrument comes into force.

during B's lifetime. It is therefore certain that none of them can reach 21 years of age more than 21 years after B dies. Admittedly it is physically possible that one of B's children may be born a few months after B's death; but the perpetuity period is extended by the period of gestation in such cases as this;[1] so the rule is not infringed, although slightly more than twenty-one years may elapse after B's death before this child reaches twenty-one.

The last-mentioned example probably suggests a question to the reader. If the gift to B's children is contingent upon their reaching some age *greater than twenty-one* (e.g. twenty-five), there is surely a possibility that some or all of B's children will not reach the specified age until more than twenty-one years after B's death. This is perfectly true, and, consequently, a gift of this kind would be wholly void at common law. The mere possibility that a gift will vest too late renders it void *ab initio.* The rule against perpetuities is exceedingly strict and rigid: it takes no account whatever of the possibility that all B's children may, in fact, reach the specified age well within the period (of B's life plus twenty-one years) which the rule allows. If there is the faintest possibility when the gift is made that it may vest too late nothing can save it from destruction. It is judged, in the case of a gift by will, at the moment when the testator dies, for that is when a will comes into operation. And it is condemned at that moment, without hope of reprieve, if there is then the slightest chance that it may vest later than the rule allows.

As may be expected, many a gift has been held utterly void because it specified that an unborn donee's interest was contingent upon reaching some age greater than twenty-one.[2] And this was very hard law from the standpoint of the disappointed donee. Consequently, the Law of Property Act, 1925, section 163, has mitigated the harshness of the rule for cases of this kind, by enacting that henceforth gifts which infringe the rule through fixing an age exceeding twenty-one years are to be read as though the age specified were twenty-one years, if by so doing the gift will satisfy the rule. This provision, however, applies only to interests which arise after 1925; consequently, it does not cure any

Law of Property Act, 1925, s. 163—when age exceeding 21 may be read as 21.

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[1] *Cadell* v. *Palmer* (1833), 1 Cl. & F. 372.

[2] E.g. to A for life remainder to such of her children as reach 23 years of age—*Re Hume,* [1912] 1 Ch. 693.

invalid devise or bequest unless the testator died after that year.

Example: To the first son of C to reach 30 years of age.

(i) Vested at testator's death—good.

1. A devise or bequest *to the first son of C to reach* 30 *years of age* was usually void before 1926. It was perfectly valid, of course, if a son of C had already reached 30 years of age before the testator died; for in that case the gift was already vested and certain at the moment when the will came into operation—the moment at which the validity of the gift was to be judged; accordingly there was no possibility that the gift could infringe the rule by vesting at too late a date.

(ii) C dies before testator—good.

2. Again, the above gift would be perfectly valid if C dies before the testator. In such a case it is certain that all C's children, if he has any, must be born (or at least conceived) before the will comes into operation. They are therefore "lives in being";[1] and any one of them who reaches thirty is bound to do so during his own lifetime. It is possible, of course, that *none* of C's children will live to reach the specified age; but the perpetuity rule is quite unconcerned with this. The rule cares nothing that a gift may never vest at all. It is concerned only to destroy any gift which may possibly vest at too remote a time.

(iii) Contingent at testator's death; C outlives testator: (*a*) Void before 1926.

3. If, however, C outlives the testator, and no son of C's has reached 30 years of age by the time the testator dies, the gift as it stands is void *ab initio*. (*a*) Let us ignore for the moment, the curative effect of Law of Property Act, 1925, s. 163; for this enactment does not apply, even if the testator dies after 1925, unless the gift as it stands infringes the perpetuity rule. It is clear that the rule is infringed if C has no children at the crucial moment—the death of the testator—since C, the life in being, may subsequently die leaving children under 9 years of age, and such children could not possibly reach 30 years of age within 21 years of C's death. But let us suppose that C already has several sons when the testator dies. Can we not say that it is now certain that the gift will vest within the perpetuity period; for these sons are lives in being, and the first of them to reach 30 years of age is bound to do so during his own lifetime. Undoubtedly this is true, and therefore if the gift were restricted to sons of C already born when the testator died the gift would be valid. But if, as in the case before us, there is no such restriction, it may well be that none of these living sons will live to reach 30 years of age, and that some son born to C several years after the testator's death will be the first to do so. There is nothing to ensure that such a son will reach 30 years of age within 21 years of lives in being. Consequently the gift is entirely void from the outset. And it is equally void even if C has a son 29 years of age when the testator dies.

(*b*) Valid after 1925.

(*b*) If, however, these facts occur with reference to the will of a testator who dies after 1925, s. 163 of the Law of Property Act, 1925, cures the gift of its invalidity. The gift is converted by the Act into a gift "to the first son of C to reach 21 years of age," and consequently it does not infringe the rule.

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[1] Children *en ventre sa mere* are treated as "lives in being"—i.e. as though already born—for the purposes of the perpetuity rule: *Cadell* v. *Palmer* (1833), 1 Cl. & F. (H.L.) 372. See also *Re Joicey*, [1933] 1 Ch. 778.

Class Gifts

Class gifts.

Testators often devise or bequeath property to a class of persons without specifying each individual beneficiary by name—e.g. *equally between the children of A*, or *to all my grandchildren equally.* In these cases it is important to know when the membership of this class is to be finally ascertained, for until one can tell how many members the class will comprise, one cannot ascertain what share any individual member is to get.[1] Class gifts, therefore, usually remain contingent until the membership of the class is fixed. Consequently, the whole gift is void *ab initio* if the class may not be fully ascertained within the perpetuity period.

For this reason testators who desire to postpone the ascertainment of a class for as long a time as possible usually specify some legitimate *ad hoc* period at the end of which the membership of the class is to close. Indeed, this method may be used with any contingent gift, for however remote the contingency may be, the gift cannot infringe the perpetuity rule if the will provides that the gift is to operate only if the contingency happens within some stated period which falls within the rule.

Thus, in *Re Villar* (1929),[2] a testator who died in 1926 bequeathed his property in such a way as to prevent the beneficiaries from attaining a vested interest until "the expiration of 20 years from the day of the death of the last survivor of all the lineal descendants of Her Late Majesty Queen Victoria, who shall be living at the time of my death." And this was held to be valid,[3] for the vesting was bound to occur within lives in being plus 21 years. There was, in fact, one year to spare. But it is of course, essential in these cases to choose as "lives in being" persons whose existence can be ascertained at the date of the grant, otherwise the limitation will fail for uncertainty.[4]

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[1] The position is otherwise, of course, if the gift is of a *fixed* sum to each member of the class—e.g. £100 to each of A's children; for here the amount which each member is to get does not depend upon the number of other members in the class.

[2] [1929] 1 Ch. 243 (C.A.).

[3] Following *Thellusson* v. *Woodford* (1805), 11 Ves. 112.

[4] E.g. *Re Moore*, [1901] 1 Ch. 936—"for the period of 21 years from the death of the last survivor of all persons who shall be living at my death"—void for uncertainty.

A contingent gift, however, which does not safeguard itself in this way will be destroyed by the perpetuity rule if the contingency in question may happen at too remote a date.

The ascertainment of a class (unless contrary intention shown):

As regards class gifts contained in a will, the Courts have evolved certain rules of construction which decide when the class is to close—though, like other rules of construction, they do not apply if the will shows a contrary intention. These rules are as follows—

(*a*) Specific gift to each member.

(*a*) If a gift (whether immediate or postponed) specifies that each member of a certain class is to get a fixed sum, the rule is that only persons who are members of that class *at the testator's death* can benefit. Accordingly, since this means that only "lives in being" are included in the gift, the gift cannot infringe the rule against perpetuities.

Thus, as in *Rogers* v. *Mutch* (1878),[1] a bequest of £100 *to each of A's children who shall attain the age of* 23 *years* cannot be too remote; for it applies only to any children of A who are in being when the testator dies.

(*b*) General gift among the members.

(*b*) In the case of a general gift (e.g. of £1000) to be divided between the members of a specified class, the class sometimes includes members born after the testator's death. There is no serious inconvenience in allowing them to share in the gift; for (unlike a gift of £100 to each member) the total sum which the executors must set aside for the class does not vary with the number of its members. The rules of construction, however, for ascertaining who are the members of such a class depend upon whether the gift is (i) immediate, or (ii) postponed.

(i) Immediate gift.

(i) If the gift is *immediate* (e.g. £1000 equally between A's children) the class normally closes at the testator's death. But if no members of the class exist when the testator dies, the class remains open and can therefore include all persons who at any subsequent time fall within it.[2]

Examples.

Thus, a bequest of £1000 "equally between the children of A" (a living person) usually benefits only such of A's children as are born before the testator's death;[2] but if A has no children at the testator's death, the gift will benefit every child of A born subsequently. In neither case, however, is the rule against perpetuities infringed; for A is a "life in being," and his children must be born during his lifetime.

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[1] 10 Ch.D. 25.

[2] E.g. *Re Powell*, [1898] 1 Ch. 227: "to the children of A equally for their lives, and, after they have died, equally between *their* children." Only those children of A *living at the testator's death* are included. (Hence the gift to their children cannot infringe the perpetuity rule.)

In the same way a gift of £1000 "equally between the *grandchildren* of A" includes, if A has grandchildren at the testator's death, those grandchildren only. And here, again, the perpetuity rule is not infringed; for they are all "lives in being," and their interests are vested at the outset. *If, however, A has no grandchildren when the testator dies,* the class includes all future grandchildren. In such a case, therefore, the gift is likely to infringe the perpetuity rule; for if we assume that A is alive when the testator dies, A is the appropriate "life in being," and we cannot be certain that all his grandchildren will be born within 21 years from his death. Consequently the gift infringes the perpetuity rule, and is entirely void. Nevertheless, the gift will escape destruction even here *if A dies before the testator*; for it is then evident that he can have no more children, and that his children already born are "lives in being." Moreover, it is certain that, before they die, all *their* children (A's grandchildren) will be born. Hence the grandchildren of A are bound to be ascertained within "lives in being," and the gift is valid—with 21 years to spare.

(ii) Postponed or contingent gifts.

When, however, a class gift is *postponed* (e.g. £1000 to X for life, remainder to A's children) or is *contingent* (e.g. £1000 to such of A's children as reach twenty-one), another rule applies; and here the rule is the same, whether or not any members of the class exist at the time when the testator dies. This rule prescribes that any person is entitled to become a member of the class if he qualifies as such before the *period of distribution.* This means, (*a*) in the case of a simple remainder to a class (e.g. to X for life, remainder to A's children) that anyone is entitled to share if he qualifies for membership before the remainder becomes an interest in possession (i.e. before the death of X).[1] But (*b*) if a bequest to a class is postponed through some condition attached to it (e.g. to those of A's children *who reach twenty-one*), the period of distribution is the moment when the first member of the class satisfies this condition, and thus becomes qualified to receive his share of the gift (i.e. as soon as any child of A reaches twenty-one). Thereupon the class closes, and includes only those who are already members of it.[2]

Examples.
(*a*) Postponed.

(*a*) Thus a devise or bequest *to X for life, and after his death to A's children equally* includes not only children living at the testator's death, but also children born to A *before X dies*. The class closes, however, when X dies; accordingly no children born thereafter can benefit from the gift.

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[1] *Devisme* v. *Mello* (1781), 1 Bro. C.C. 537; *Re Dawes' Trusts* (1876), 4 Ch.D. 210.

[2] *Re Deloitte,* [1919] 1 Ch. 209 (C.A.); *Re Paul,* [1920] 1 Ch. 99.

Similarly, a devise or bequest *to X for life, and after his death to A's grandchildren equally* can benefit only grandchildren born before X dies. Consequently, if X is a life in being at the testator's death the remainder to A's grandchildren, being bound to vest as soon as X dies, cannot infringe the perpetuity rule.

(*b*) Contingent.

(*b*) The facts of *Re Deloitte* (1919)[1] involved a bequest of £3000 to trustees upon trust for *the children of A who should* (whether living at the testator's death or born subsequently) *attain the age of* 21. The testator died, and a few years later a child of A—the only child yet born—reached 21 years of age. *Held:* the class then closed; hence no future child of A could enter the class; hence A's only child was entitled to the whole of the legacy.

Clearly the perpetuity rule did not affect this bequest—being to the children of a living person at 21. On the other hand, if the bequest had been contingent on their reaching some *greater age than* 21 (e.g. 30) it would have infringed the rule in the old days; though section 163 of the Law of Property Act, 1925, would save it, by reducing the age to 21, if the testator died after 1925. Even here, however, the gift would be valid without assistance from the Act if there was already a child of the specified age when the testator died; for the fact that a child has reached the age prescribed closes the class, and consequently the bequest would then include only children of A already born, and so would be confined to persons who were "in being" when the will came into operation.[2]

(*c*) Postponed and contingent.

(*c*) A combination of these two rules arises if, as in *Re Paul* (1920),[3] a testator bequeaths £20,000 to trustees upon trust for *B for life and thereafter for the testator's grandchildren on attaining* 21. In such a case the class does not close until B is dead *and* one of the grandchildren has reached 21; for the period of distribution does not arrive until *both* of these events have happened. Hence it was held that so long as B lived the class remained open, although a grandchild had already reached 21. Consequently, any grandchildren born during B's lifetime would become members of the class, and would qualify for a share of the property on reaching 21; for obviously the period of distribution cannot arrive until B's life interest is over.[4]

Here, again, the bequest escaped the rule against perpetuities, although it might admit every grandchild of the testator who should reach 21. For a gift by will does not arise until the testator dies; and at that moment all his *children* must be born, and are therefore "lives in being." Therefore *their* children (his grandchildren) cannot reach 21 years of age later than 21 years after the end of these "lives in being." The gift, therefore, is just within the rule.

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[1] [1919] 1 Ch. 209 (C.A.).

[2] *Re Mervin*, [1891] 3 Ch. 197; *Picken* v. *Mathews* (1878), 10 Ch.D. 264.

[3] [1920] 1 Ch. 99.

[4] In fact B's life interest was in only one-half of the £20,000. But it was held, nevertheless, that the period of distribution would not arrive for any part of the fund until B's death—following *Re Faux* (1915), 84 L.J. Ch. 873.

Gifts to the unborn children of unborn persons.

It is evident, from the examples already given, that a gift to the unborn child of an unborn person is practically bound to infringe the perpetuity rule—unless, indeed, a protecting clause is inserted which fixes some period allowed by the rule, and provides that the gift is to occur only if it vests during that period. We have already seen[1] that the rule in *Whitby* v. *Mitchell*, until its abolition by the Law of Property Act, 1925, section 161, also attacked gifts of this kind, if preceded by a life interest for the unborn parent; but, evidently, the abolition of the *Whitby* v. *Mitchell* rule has done little to protect such gifts from failure, for they are still subject to the rule against perpetuities. Indeed, if, as seems likely, the *cy près* doctrine (by which they were sometimes protected from both rules, by construing the gift as an entail to the unborn parent) is abolished also,[1] they are even more precarious than they were before the Act.

Thus, in *Re Frost* (1889),[2] property was devised to the testator's daughter (a spinster) for her life, remainder to any husband she might marry for his life, remainder to all her children living at the death of the survivor of herself and her husband. The Court held that this final remainder was invalid for two reasons: (i) because it infringed the rule in *Whitby* v. *Mitchell*—since her future husband might be yet unborn,[3] and (ii) because it infringed the rule against perpetuities. It will be noticed that this remainder to the children was not to vest *until the death of the survivor of the daughter and her husband.* Consequently, the class of children to benefit might remain uncertain until the death of a husband yet unborn. There was nothing to ensure that this husband would die within 21 years after the end of the life in being (his wife). Hence the remainder to the children was too remote.

In *Ward* v. *Van der Loeff* (1924),[4] a testator devised and bequeathed his property to trustees upon trust for his *widow for her life with remainder for such children of his brothers and sisters as should reach* 21 *years of age* ("whether living at the death of my wife or born at any time afterwards before any one of such children attains a vested interest"). This remainder to the children would have been perfectly valid if it had been clear that their parents were "lives in being" at the testator's death; for they were certain to reach 21 years of age within the lives of their parents plus 21 years. As it happened, however, the testator's father and mother outlived him. Accordingly there was a possibility (though a very slight one, for both his parents were 66 years of age)[1] that further brothers and sisters of the testator would be born after he died. The gift to the children of his brothers and sisters was wide enough to include the children of brothers and sisters yet unborn. The House of Lords therefore decided that the gift was entirely void, as such children might reach 21 years of age at too remote a time.

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[1] *Supra,* Section *B.*

[2] 43 Ch.D. 246.

[3] But see *Re Bullock,* [1915] 1 Ch. 493.

[4] [1924] A.C. 653.

[It should be observed that the Rule in *Whitby* v. *Mitchell* did not apply in this case because the remainder to these children was not preceded by a life estate to their unborn parents.]

Powers of Appointment

Powers of appointment.

A will may be concerned with a power of appointment either because the testator himself has been given a power to appoint another person's property by his will, or because the will empowers some person to appoint the testator's property. In either case it is important to ensure that neither the instrument which created the power of appointment nor the instrument by which the appointor exercises the power infringes the rule against perpetuities.

Powers and the perpetuity rule.
(i) Remote powers.

In the first place it is necessary to observe that the power to appoint may itself be too remote, and therefore void. Clearly, this may be so as regards *special* powers of appointment; for on several occasions the Courts have held that an attempt to create a special power is void if it allows an appointment to be *made* at too remote a time.[2]

As a rule the power is given to a single individual, and, since he obviously cannot exercise it after he is dead, such a power is bound to be valid. But if, as in *Re De Sommery* (1912),[3] a special power is given to a succession of persons (e.g. trustees), or to someone yet unborn, the power will be too remote and will be void unless restricted to the perpetuity period.

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[1] It was decided as early as 1787 that the law treats a woman (in these perpetuity cases) as capable of bearing children, however aged she may be: *Jee* v. *Audley* (1787), 1 Cox. 324. See also *Re Deloitte*, [1926] 1 Ch. 56.

[2] Compare *Re Allott*, [1924] 2 Ch. 498 (C.A.), where a general power of leasing given to trustees was held to infringe the perpetuity rule—*semble* because it empowered the creation of a *new interest* in land at too remote a date.

[3] [1912] 2 Ch. 622.

(ii) Remote appointments.

Normally, however, an appointment which comes to grief by virtue of the rule against perpetuities fails, not because the power was improperly created, but because the appointor when making the appointment selects objects which are too remote—i.e. because the power is improperly exercised.

(a) General powers.

There is not much danger that this will happen in the exercise of a *general* power of appointment, for such a power enables the appointor to appoint any person whatever, and, therefore, is closely akin to ownership. Consequently, the destination of the property is not fettered until he makes an appointment. Accordingly, the appointor has only to take the precautions which would be necessary in making a gift of his own property. Thus, if a testator, who has been given power to appoint X's property to whomsoever he wishes, appoints that property by his will, the rule against perpetuities applies to that appointment in just the same way as it applies to any other disposition in his will. The appointment is therefore prefectly valid unless it attempts to give a contingent interest which may vest too late—i.e. after the expiration of any appropriate lives in being at the testator's death and a further twenty-one years.

(b) Special powers.

Particular caution is necessary, however, when the donee of a *special* power is making an appointment. We have already noted that a special power of appointment fetters the appointor's choice, in that it empowers him to appoint only to some person or persons who belong to a particular class designated by the instrument which created the power. In a sense, therefore, the property which he is empowered to appoint is itself fettered from the very moment that the power is created. For this reason it has been decided that an appointment under a special power infringes the perpetuity rule unless one can be *certain when the appointment is made*[1] that the interests which it gives cannot vest later than twenty-one years after the expiration of *lives which were in being at the date when the power was created.*[2] The difference, therefore, between an appointment under a general power and an appointment under a special power is that the perpetuity period does not begin until an appointment is made if the power is *general*, whereas it begins immediately the power is created in the case of a *special* power.[1]

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[1] See *Re Paul,* [1921] 2 Ch. 1; *Re Thompson,* [1906] 2 Ch. 199.

[2] If no appropriate lives in being are available, the period is merely *twenty-one years* from the date when the power was created.

If this point is borne in mind, the perpetuity rule presents no particular difficulty in its application to powers of appointment. The length of the perpetuity period is the same, whether the power be general or special; but it begins earlier, and consequently ends earlier, when the appointment is made under a special power.

Examples.

(i) Thus, settlements made in contemplation of marriage frequently empower the prospective husband or wife to appoint the settled property by will *among the issue of the marriage.* This is a *special* power of appointment, and the settlement which creates the power is usually executed before the marriage occurs. Consequently, there are no issue of the marriage at the time when the power is created, and the only relevant "lives in being" are therefore the man and woman who are about to marry. Let us suppose that the wife bears children and dies leaving a will which appoints the property to her *first grandchild to be born*, and that when she dies no grandchild has yet been born. If we remember that the perpetuity period begins to run when the power was created it is evident that this appointment is void; for it is quite possible that her first grandchild will be born more than 21 years after she and her husband are dead.

If, however, her power of appointment was a *general* power, enabling her to appoint the property to anyone, a similar appointment by her will to her *first grandchild to be born* would be perfectly valid. Here, the power being general, the perpetuity period begins to run when the appointment is made—i.e. at her death. At that moment all her *children* are "lives in being." The appointment is therefore good, for her first grandchild must be born during the lives of her children.

(ii) In *re Paul* (1921)[2] a woman was empowered by her father's will to appoint property among her children. Several years after her father's death she bore a son; and when she died he was just over 18 years old. Her will appointed the property to him *contingently on his reaching* 25. This appointment, though an appointment under a *special* power, was valid. The son, being already over 18 years of age when his mother died, could not possibly reach 25 more than 21 years after her death; and she was a "life in being" at the time when her father's will created this power of appointment.

If, however, the son had been under 4 years old when his mother died, her appointment to him would have been void, since he could not reach 25 within 21 years of her death. But even here it would be valid if she died after 1925, since s. 163 of the Law of Property Act, 1925, would read the appointment as contingent on his *reaching twenty-one*, and so cure it of its invalidity.

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[1] At one time it was thought that a general power to appoint by *will only* was for this purpose equivalent to a special power: *Re Powell* (1869), 39 L.J. (Ch.) 188. But this view has not prevailed—*Rous* v. *Jackson* (1885), 29 Ch.D. 521; *Re Flower* (1885), 55 L.J. (Ch.) 200.

[2] [1921] 2 Ch. 1.

Miscellaneous points concerning the perpetuity rule:

The foregoing account of the perpetuity rule covers in outline the greater and most important part of this subject, insofar as it concerns wills. There are still, however, a few miscellaneous points about the rule which should be mentioned here.

(i) Does not destroy vested interests.

In the first place, it should be remembered that the rule attacks only *contingent* or uncertain interests. It has no objection to vested interests. Accordingly, if one can say when a gift is made that both who is to get it and what interest he is to have are perfectly obvious, and that his chance of getting it does not depend on the happening of some event which may never happen at all, the gift cannot infringe the rule. Indeed, the rule is beneficial to vested interests, rather than destructive. For if a gift is "vested subject to be divested," or, in other words, if a gift confers a vested interest to which a condition subsequent is attached, the rule against perpetuities will destroy that condition subsequent if it is too remote, and will thus save the interest from premature determination. Thus, the perpetuity rule may convert an interest which is ostensibly *vested subsequent to be divested* into one which is *indefeasibly vested* and, therefore, free to continue its allotted space of life without fear of interruption.

Unless they follow an interest which infringes the rule.

In one case, however, the perpetuity rule destroys interests regardless of whether they are vested or contingent. All interests, whether vested or contingent, which follow in remainder after an interest which is too remote, are themselves void.[1] This is a harsh and somewhat illogical rule, but it is now firmly established.

Thus, in *Re Backhouse* (1921),[2] a testator, who wished a certain picture to be kept in the family, bequeathed it by his will (i) to A (his eldest son) for life, (ii) and then to B (his second son) for life, (iii) then to C (his daughter) for life, (iv) then to every son of A living at his death successively for their respective lives in order of seniority, and then (v) to every son of B then living successively for their respective lives, then (vi) to every son of C then living successively for their respective lives, with a final remainder (vii) to the testator's heir absolutely. The residue of his property he bequeathed to his two sons absolutely in equal shares.

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[1] *Monypenny* v. *Dering* (1852), 2 De G.M. & G. 145. But this rule does not apply to a gift over on default of appointment when the power (or appointment) is void for remoteness: *Re Abbot*, [1893] 1 Ch. 54.

[2] [1921] 2 Ch. 51.

It will be observed that the first three clauses of this bequest were valid, for they gave vested interests to children who were in being at the testator's death. Clause (iv) was also valid, since it conferred contingent interests on those of A's children who were living at the death of the testator's daughter, C (a life in being at his death). But clause (v) was void, for it attempted to give contingent interests to those of B's children who would be alive *when the last survivor of A's children died*; and the last surviving child of A was not bound to die within 21 years of the end of the lives in being (A, B, and C).

Accordingly, Eve, J., held that, not only clause (v), but all the remainders which followed it were void. The final remainder to the testator's heir was a vested remainder, since the heir of a person is known as soon as that person dies, and there was therefore no uncertainty about it when the will came into operation. Nevertheless, since this remainder followed remainders which infringed the perpetuity rule, it was invalid. Hence the picture went to the persons specified in the first four clauses and then passed to the persons entitled under the testator's residuary bequest.

(ii) Does not apply to a gift over from one charity to another.

Secondly, *charities*[1] are favoured by the rule to a certain extent, in that it does not attack a gift over from one charity to another, however remote the contingency may be on the happening of which the second charity is to benefit.

Testators sometimes take advantage of this exception when they wish to ensure that something shall continue to be done for ever.[2] Thus, in *Re Tyler* (1891),[3] a testator desired to ensure that his family vault would be kept in repair. He therefore bequeathed a large sum of money to one charity (the London Missionary Society) on condition that if it should fail at any future time to keep the vault in good repair another charity was to get the money (the Blue Coat School). The legacy was so substantial—some £40,000—that the first charity could be relied upon to observe the testator's wishes for fear of losing the money. *Held:* This gift over, or condition subsequent, was valid, although since it might occur at some time far beyond the period allowed by the perpetuity rule, it would have been void if the legatees had been individuals.

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[1] See Keeton, *Law of Trusts*, Ch. VIII, as to what is and what is not a "charity."

[2] This method is not necessary if the testator's purpose is charitable, for in such a case the property may be given to trustees *upon trust* to use it for that purpose. A perpetual *non-charitable* purpose trust, however, would be void as infringing the rule against inalienability. *Supra,* Section *C*. Keeton, *Law of Trusts*, p. 137.

[3] [1891] 3 Ch. 252 (C.A.).

(iii) Sundry other exceptions.

Finally, it may be noted that the rule against perpetuities does not usually apply to any of the following: (1) Remainders or gifts over after entailed interests;[1] (2) certain rights of re-entry protected by the Law of Property Act, 1925;[2] (3) trusts to accumulate the income of property in order to produce a fund for the payment of the settlor's debts;[3] and (4) similar trusts to accumulate income in order to help to pay off the National Debt.[4]

E. DIRECTIONS TO ACCUMULATE INCOME

Sometimes a testator leaves property to trustees upon trust to accumulate the income which it produces. The trustees are then bound to invest the income as soon as they receive it; and, accordingly, the property will grow, at compound interest, so long as the accumulation continues. But the law does not favour these directions to accumulate.

Perpetuity rule applies.

Such directions are, therefore, *entirely void* (with two exceptions mentioned in the preceding paragraph) if the period during which the accumulation is to continue exceeds the perpetuity period.[5]

Additional statutory rules.

During the nineteenth century, however, even stricter limits than this were imposed upon accumulations by Statute;[6] and these statutory rules are now embodied in the Law of Property Act, 1925, sections 164 to 166. Their approximate effect upon testamentary directions to accumulate is (1) if the *sole* object of accumulating the income is to produce a fund *for the purchase of land*, the accumulation can only occur during the minority of some infant (or infants) who would be entitled to that income if he (or they) were of full age; (2) if the income is being accumulated for some other purpose than the purchase of land, the accumulation is permitted to continue *either* (i) during the infancy of the person or persons entitled, as above, *or* (ii) during the infancy of any other person or persons—if living (or conceived) when the testator dies, *or* (iii) for twenty-one years from the testator's death.[1]

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[1] See Goodeve and Potter's *Real Property*, p. 372. The perpetuity rule appears to apply only if the limitation may not arise until an interval has elapsed from the expiration of the preceding entail.

[2] E.g. ss. 121 (6), 162.

[3] See Goodeve and Potter, *op. cit.*, 380.

[4] Superannuation and other Trust Funds (Validation) Act, 1927, s. 9.

[5] *Thellusson* v. *Woodford* (1799), 4 Ves. 227; (1805), 11 Ves. 112. On the face of it one would have expected remote accumulations to infringe the rule against inalienability rather than the perpetuity rule. But it is settled that the perpetuity period fixes the limits of a valid accumulation.

[6] Accumulations Acts, 1800 and 1892.

It will be observed that period (iii) fixes a maximum accumulation of twenty-one years from testator's death, and that period (ii) is substantially the same, for even if an accumulation is directed during the infancy of someone who is *en ventre sa mere* at the testator's death, its total duration cannot exceed twenty-one years by more than a few months. But period (i) (and the similar period fixed where the object of the accumulation is to buy land), which allows accumulation during the minority of a person or persons who would, if of full age, be entitled to the income, differs from the other two. Firstly, it *need not begin at the testator's death*—for it applies even to the minorities of persons born subsequently; and, secondly, it *may sometimes allow a total period of more than twenty-one years*—for it is wide enough to include successive minorities.[2]

Effects of infringements.

There are several statutory exceptions to these rules, e.g. any accumulation for the payment of any person's debts.[3] But, perhaps, the most important point to remember about the accumulation rules is that they do not act so harshly as does the rule against perpetuities; for whereas any interest or direction to accumulate which infringes the perpetuity rule is *utterly void*, a direction to accumulate which merely exceeds the periods allowed by the accumulation rules is only *void for the excess*.[4]

(1) Thus, in *Re Deloitte* (1926),[5] a woman died having bequeathed £25,000 to trustees upon trust to pay £500 per annum out of the income to her niece for life, *and to accumulate the surplus income*. On the death of the niece the trustees were directed to hold the capital and accumulated income upon trust for those

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[1] There is a fourth alternative period inapplicable to wills—viz. the lifetime of the grantor or settlor.

[2] *Re Cattell*, [1914] 1 Ch. 177 (C.A.).

[3] See Law of Property Act, 1925, ss. 164 (2), 166 (2), and s. 165, as to which see also Trustee Act, 1925, s. 31 (2), and *Re Maber*, [1928] Ch. 88.

[4] *Re Walpole*, [1933] 1 Ch. 431.

[5] [1926] 1 Ch. 56.

of her children who should attain the age of 21 years. She bequeathed the residue of her property to X.

This involved a direction to accumulate income during the life of the niece. It was therefore invalid. But it did not exceed the perpetuity period, for it covered only a life in being; so it was *not entirely void*. Yet it was void insofar as it exceeded the periods (e.g. 21 years from testator's death) allowed by the accumulations rules. Consequently, since the niece outlived the testatrix by over 21 years, the accumulation of income had to stop 21 years after the death of the testatrix. Thereafter the surplus annual income was payable to X, the residuary legatee, until the niece died; for the terms of the bequest did not allow the children of this niece to benefit so long as she remained alive.

(2) In *Re Knapp* (1929)[1] a testator, who died in 1927, bequeathed the residue of his property to the Trustees of the Scarborough Municipal Charities, upon trust to accumulate the income for 21 years and then to use the accumulated income in order to buy land *and to build almshouses thereon and keep them in repair.*

This direction to accumulate would have been wholly invalid, had its *sole* purpose been the purchase of land; for the Act, in such a case, allows accumulation only during the minority of an infant beneficiary, and here there was no infant beneficiary.

But since the purposes of the accumulation included other objects (building and repairing) the direction to accumulate was valid, in view of the fact that it was only for a period of 21 years from the testator's death.[2]

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[1] [1929] 1 Ch. 341.

[2] *Held*, however, that the charity, being solely entitled, could countermand the accumulation if it so desired. A sole beneficiary who is *sui juris* can put an end to an accumulation which is exclusively for his benefit—*Saunders* v. *Vautier* (1841), 4 Beav. 115. And this is equally the rule when the beneficiary is a charity—*Wharton* v. *Masterman*, [1895] A C. 186.

CHAPTER XI

CONSTRUCTION: I. GENERAL PRINCIPLES[1]

A. INTRODUCTORY

Courts of probate and construction.

WE have already noticed that the Court of Chancery obtained jurisdiction over disputes concerning the interpretation to be placed upon the words and phrases contained in a will, though not over questions as to a will's validity.[2] Thus, it comes to pass that a "court of probate" (now usually the Probate, Divorce and Admiralty Division of the High Court) is concerned only to ascertain whether the document before it is a valid will; whereas a "court of construction" (now usually the Chancery Division) concerns itself only with the meaning and effect of the words and phrases which a testator has used in what is admittedly a valid testamentary instrument.

Even a Court of Probate, however, is sometimes required to construe the words and phrases of a document; for the document cannot be a valid will if its words show that it was not made *animo testandi*, or that it was not intended to be ambulatory. It is more often concerned, however, with questions of attestation, execution, revocation, and the like. Moreover, when a Court of Probate, in the course of determining whether a document is a valid will, expresses an opinion as to the construction to be placed upon its contents, this opinion is binding only insofar as it enables that Court to decide whether probate should be granted. Accordingly, such an expression of opinion is *not* binding upon a Court of Construction, if the will is subsequently brought into such a Court in order to be construed there.[3]

Intentions prevail if evident from the will.

The business, then, of a Court of Construction is to decide what meaning should be attributed to some disputed clause in a will. If the intentions expressed by a will are perfectly obvious and clear, the construction of that will can present no difficulties; and even when a will does not express the testator's intentions as lucidly as one could wish, the Court will give effect to his intentions if they can be ascertained with reasonable certainty from a perusal of the will. But if a will uses words or phrases which are capable of two or more different interpretations, and fails to show in which sense the testator intended to use them, the Court is faced with two alternatives: it must either adjudge the disposition to be void for uncertainty, or decide, on some principle or other, that one particular interpretation must be followed and the others ignored. If it adopts the latter—and more benevolent—system it is said to apply a *rule of construction*; and these rules of construction which the Courts have evolved to meet difficulties of this kind are our chief concern in this branch of our subject. But it is extremely important to remember that a rule of construction should be applied only as a last resort. It can never override intentions clearly expressed by the testator in his will.

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[1] Only the rules and principles of construction prescribed by *English* law are discussed here. Foreign rules of construction may be relevant, however, e.g. if the testator was domiciled abroad when he made the will. See Dicey, *Conflict of Laws* (ed. 1932).

[2] *Supra,* Ch. II (*C*); Holdsworth, *History of English Law,* VII, 395–398.

[3] *Re Hawksley's Settlements,* [1934] 1 Ch. 384, 396.

Rules of construction are applied only if intentions are not clear from the will.

Rules of law.

In this respect rules of construction are quite different from *rules of law*. A rule of law, such as the perpetuity rule (*supra* Chapter X, *D*), is applicable whether the result will be consistent with the testator's evident intentions or not. Thus, a contingent gift is void if it infringes the rule against perpetuities, however strongly the testator's will may state that he desires that gift to stand. But rules of construction are quite inapplicable when the intention expressed by a will is clear; consequently, they can never override a testator's intention unless he failed to express it properly in his will.

Thus, in *Re Stone* (1895)[1] a question of the construction of a will came before the Court of Appeal; and many decided cases were invoked to support the contentions of the opposing parties, who urged that these decisions had established certain rules of construction which governed the point in hand. Nevertheless, these decisions were entirely ignored by the Court, for it was found that the will itself made its meaning sufficiently clear. In the words of Lindley, L. J. (at p. 200), "I do not enter into an examination of the cases; when I see an intention clearly expressed in a will, and find no rule of law opposed to giving effect to it, I disregard previous cases."

The following account of some of the more important principles and rules of construction necessarily omits many of the more advanced and technical aspects of the subject. For a comprehensive survey the reader should refer to the leading textbooks—such as Hawkins on *Wills*.[1] Here it is proposed to give only a brief outline of the major topics of the subject.

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[1] [1895] 2 Ch. 196 (C.A.).

B. GENERAL PRINCIPLES OF CONSTRUCTION

The Court construes wills: it does not re-make them.

The duty of a Court of Construction is to interpret the words which a testator has embodied in his will. Whether they do or do not produce a fair result is beside the point. Our law allows testators to dispose of their property by will to whomsoever they choose; its only requirement is that they must make such dispositions in proper legal form, which, as we have seen, usually necessitates writing duly signed and attested. Consequently, the Court has no power to re-mould clear words in order to re-cast what appears to be an unfair bequest; and this is so even if the Court suspects that the testator did not, in fact, desire the bequest to operate in the fashion which its words prescribe. In short, the Court's business is to construe the testator's will, not to make a new will for him.

Thus, in *Scalé* v. *Rawlins* (1892),[2] a testator had devised three houses to A (his niece) *for life*, but if she should die *leaving no child or children* these houses were to go to his nephews. A outlived the testator and then died leaving children. It was urged that the terms of the devise showed that the testator intended (although his will did not actually say so) that if A left children the houses were to go to them. Both the Court of Appeal and the House of Lords, however, decided that the will clearly gave A no more than a life interest and gave nothing to her children. Consequently when A died leaving children the houses devolved upon the testator's *residuary devisees*, inasmuch as the specific gift had made no provision for this eventuality. If the testator desired A's children to benefit he should have said so in his will.

Words:

(i) *Prima facie* their primary meaning is applied.

In matters of construction, therefore, the Court's fundamental guide must be the words which the testator used in his will. Moreover, as one might expect, the Court assumes that those words were used in their ordinary natural sense; or, as it is usually expressed, their *primary* meaning is attributed to him. Here, again, the fact that this construction may produce capricious results matter nothing. But if, on reading the will as a whole, or on investigating the habits and circumstances of the testator, it is evident that he used a particular word or phrase in some special sense of his own, the Court may interpret it in this special or *secondary* sense; provided that the word or phrase is, in fact, capable of carrying such a meaning.

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[1] Also Jarman on *Wills*, Theobald on *Wills*, and Underhill and Strahan on *Wills and Settlements*.

[2] [1892] A.C. 342.

(ii) When construed in a secondary sense.

(i) Thus, in *Gilmour* v. *MacPhillamy* (1930),[1] a testator bequeathed the income from his residuary estate to his nine children in equal shares for their respective lives; the share of each child to pass to his children (if any) at his death; provided that if any such child die without issue his share be divided equally among the *survivors*. Five of the children died leaving issue; then two died without issue; the remaining two survived. *Held:* the two survivors took the shares of the two who died without issue. The fact that this interpretation unfairly excluded the descendants of the five children who had died earlier made no difference; for there was nothing in the context to give any secondary meaning to the word "survivors."[2]

(ii) *Re Smalley* (1929)[3] illustrates the power of the Court to interpret a word in a secondary sense when the surrounding circumstances of the testator show that he used it with that particular meaning. A testator bequeathed all his property to "my wife E.A.S." The lady named believed herself to be his wife, and was generally reputed to be; but in fact he had committed bigamy in marrying her, for he was already married to another. The Court of Appeal, however, on evidence of these surrounding circumstances, construed the word "wife" to mean his *reputed* wife, to the exclusion of his lawful wife; for the circumstances showed that he had used the word in this secondary sense.[4]

Similarly, evidence of surrounding circumstances may show that a testator who bequeathed all to "mother" was accustomed to describe his wife as such;[5] or that a bequest to the testator's son "Forster" referred to his son Charles, whom he had habitually called by the name of Forster during his lifetime.[6]

The "dictionary principle."

A common case of the admission of a secondary meaning occurs when the so-called *dictionary principle* applies. If the will itself states that a certain word is used therein in some special sense the Court will construe it in that sense accordingly. In such a case the testator may be said to have supplied a dictionary in his will for the elucidation of the meaning of the word in question. Moreover, the same principle applies if the will, taken as a whole, supplies this information indirectly—e.g. if the word in question is employed by other parts of the will in an unusual though unmistakeable sense.

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[1] [1930] A.C. 712 (P.C.).

[2] See the "first rule in *Re Bowman*" (1889), 41 Ch.D. 525. *Aliter* had the will shown an intention to use the word "survivors" as meaning "others"—"second rule in *Re Bowman*."

[3] [1929] 2 Ch. 112 (C.A.).

[4] See also *Re Wagstaff*, [1908] 1 Ch. 162.

[5] *Thorn* v. *Dickens*, [1906] W.N. 54.

[6] *Charter* v. *Charter* (1874), 7 H.L. 364.

Thus, in *Re Helliwell* (1916),[1] a testator who bequeathed property to his *nephews*, and who expressly stated in his will that his illegitimate sister's illegitimate son was to share "*equally with my other nephews*," showed thereby that he used the word in a wide secondary sense to include illegitimate nephews. Accordingly the sons of another illegitimate sister were held to be entitled to share in the bequest also.

Technical words and phrases:

If a will employs words or phrases which have acquired a technical meaning in legal (or in scientific) terminology, this technical meaning will normally be attributed to them. But here, again, although this is their *primary* meaning, it is possible to construe them in some secondary sense if the will provides sufficient evidence that this is what the testator intended. One would naturally expect, moreover, that such a secondary meaning would prevail in cases where surrounding circumstances show that the testator used them in some secondary sense. But, unfortunately, the Courts, when faced with technical expressions, have been reluctant to construe them in a non-technical sense, unless the will itself compels the conclusion that the testator so employed them.

(1) "Heirs."

Among technical terms, perhaps, the words "heirs" (or "heir") and "heirs (or heir) of the body" have been most strictly confined to their technical legal meanings.[2] Probably this is due in part to the fact that the law was always prone to favour an heir's claim to inherit the lands of his ancestor, and in part also to the fact that these words were pre-eminently technical both by virtue of the fixed rules whereby the heir was ascertained, and by virtue of the fact that these words were at one time essential[1] to grants of land in fee.[2]

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[1] [1916] 2 Ch. 580.

[2] Whether used in the singular or plural the effect is usually the same; see Law of Property Act, 1925, s. 61.

Re Smith (1933)[3] shows how these old ideas still rule us from their graves. There a testatrix, who died in 1883, devised her land to certain persons for life with remainder to "*my own right heirs* (*other than my nephew Robert and his issue*)." In 1929 the life interests ended, and the Court was asked to decide who was next entitled. The testatrix had left no children; but Robert, her eldest nephew, had died before her leaving a son; and this son was her heir-at-law. Apparently she had intended the land to go to the person who would have been her heir if Robert and his children had never existed. But Clauson, J., was reluctantly compelled to follow an ancient decision of the House of Lords,[4] and to hold that the gift was void; for, giving the word "heirs" its technical meaning, the gift amounted to a devise "to my heir (other than my heir)," and was therefore meaningless.[5]

There are several cases, however, which show that a testator is perfectly free to give a secondary meaning even to such technical words as "heirs" or "heirs of his body," provided that his will shows clearly what meaning he has in mind.[6] Thus, if he devise lands to the "heirs of A's body, *that is to say* to A's sons," the Court will construe the words in the manner he has prescribed.[7] Indeed, it would seem that this, the dictionary principle, is the only sure method of overcoming the severe technicality which primarily attaches to these words.[8]

Bequests to "heirs."

Nevertheless, the heir was not so strongly favoured in bequests of *personal property*; for this, as we have seen, did not pass to him on intestacy, but to the next of kin under the Statutes of Distributions; consequently, the law never regarded him as having any special claim to it. Hence, in bequests of personalty, the Courts were always less reluctant to construe words such as "heirs" or "heirs of his body" in a secondary sense.[1]

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[1] They ceased to be essential after the Conveyancing Act, 1881. See now, Law of Property Act, 1925, ss. 60, 130.

[2] The celebrated *Rule in Shelley's Case* (now abolished by Law of Property Act, 1925, s. 131) also served to increase the technicality of the words "heirs" and "heirs of the body"; see, e.g. *Van Grutten* v. *Foxwell*, [1897] A.C. 658.

[3] [1933] 1 Ch. 847.

[4] *Goodtitle d. Bailey* v. *Pugh* (1787), 3 Bro. P.C. 454.

[5] This resulted in favour of the heir; for, as testatrix died before 1926, the property, being undisposed of, went to the heir under the old intestacy rules. The heir would not benefit as such had she died after 1925, but here again the devise (*semble*) would be void by virtue of the ancient decision of the House of Lords.

[6] See *Roberts* v. *Edwards* (1863), 33 Beav. 259, 261.

[7] See *Lowe* v. *Davies* (1729), 2 Ld. Raym. 1561; *Lightfoot* v. *Maybery*, [1914] A.C. 782.

[8] See also L.Q.R., 1933, pp. 464–465, for a note by Sir Frederick Pollock on this point.

Are governed by the same rules as devises if testator dies after 1925.

Since 1925, however, the foregoing paragraph must now be read subject to section 132 of the Law of Property Act, 1925, which enacts that a limitation of real or personal property in favour of the *heir* (*either general or special*[2]) of a deceased person operates in favour of the person who would have been his heir under the general rules of inheritance which existed immediately before 1926. The section emphatically excludes any possibility of construing the word "heir" or "heir of the body" in a secondary sense, unless it would have borne a secondary meaning when so used in a devise of freehold land.[3] Moreover, the section appears to be equally applicable to the plural words "heirs" and "heirs of the body."[4] Accordingly, the rules of construction which formerly applies to these words when contained in a devise of real property now apply to bequests of personal property also.

(ii) "Personal representatives."

As one might expect, the technical phrase "personal representatives" (or "representatives," or "legal representatives") primarily means executors or administrators. Hence, a bequest of personalty to "the personal representatives of A" will ordinarily pass to A's executors or administrators; and, since they take it in their official capacity, it becomes part of A's estate—and is, consequently, liable for his debts.[5] This phrase, however, is by no means so firmly wedded to its technical sense as is the word "heirs." Accordingly, testators have often succeeded in giving it a secondary meaning—e.g. where a bequest "to the personal representatives of A" is followed by words which show that they are intended to take the gift *for their own benefit.* In such a case as this, the Court is inclined to conclude that the phrase was intended to mean, not A's executors or administrators, but his statutory next of kin—i.e. the persons *beneficially* entitled to his personal property under the intestacy rules.[1]

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[1] E.g. *Re Jeaffreson* (1866), 2 Eq. 276 ("heirs of the body" = statutory next of kin); *Re Whitehead,* [1920] 1 Ch. 298 ("heirs" = statutory next of kin).

[2] E.g. the heir begotten of a named marriage.

[3] Section 132 enacts that such a gift, whether of realty or personalty, "*shall* operate" in favour of the person who was heir under the pre-1926 rules of inheritance if it would have done so before 1926 in the case of freehold land.

[4] Section 1 (1) of the Interpretation Act, 1889, provides that "in every Act passed after 1850 . . . unless the contrary intention appears . . . words in the singular shall include the plural."

[5] See *Re Brooks,* [1928] Ch. 214 (C.A.).

(iii) "Statutory next of kin."

We have already seen that, when a person died intestate before 1926, his personalty devolved (via his administrators) upon his spouse and near relations as prescribed by the Statutes of Distributions.[2] We have seen also that these rules, though preferring near relations to more remote, did not favour all near relations equally. In particular, if the deceased left children these children would benefit to the exclusion of his parents despite the fact that his parents are equally nearly related to him. Moreover, this is true also of the modern intestacy rules enacted by the Administration of Estates Act, 1925. Evidently, therefore, one cannot say with complete accuracy that property devolves, on intestacy, upon the deceased's nearest relatives or *next of kin.*

Cf. "Next of kin."

Hence, the phrase "next of kin" is not a technical phrase. Accordingly, if a testator bequeaths property "to my next of kin," he is taken to mean merely the person or persons who constitute his *nearest blood relations* when he dies (unless, of course, the will shows a contrary intention), for this is the natural meaning of his words.[3]

The position, however, is very different if his words show that he wishes to benefit only those relations to whom property would pass under the intestacy rules—e.g. if he bequeaths property to *the "statutory next of kin"* or to the "*next of kin under the Statutes of Distribution*"—whether he is referring to his own kin or to those of some other person. In such a case he is using a technical phrase. The Court must, therefore, construe it according to its technical legal meaning, unless his will shows very clearly that he intended differently.[4]

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[1] E.g. *King* v. *Cleaveland* (1858), 26 Bea. 26; (1859), 4 De G. & J. 477. There appear to be no modern decisions on this point. Presumably the beneficiaries will now be those entitled on intestacy under the Administration of Estates Act, 1925. And presumably the same construction now applies to a *devise* to personal representatives (since they are now real representatives also).

[2] *Supra*, Ch. II, *D*.

[3] *Re Winn*, [1910] 1 Ch. 278; *Re Bulcock*, [1916] 2 Ch. 495.

[4] Although the deceased's wife (or husband) is entitled to a share of his property on intestacy, a bequest to "statutory next of kin" (or any similar phrase) primarily excludes her (or him). This is so because marriage does

Administration of Estate Act, 1925, s. 50.

This matter is now governed by section 50 of the Administration of Estates Act, 1925. It enacts (1) that if a testator *dies after* 1925 any reference in his will to Statutes of Distribution or statutory next of kin must be construed to refer to the new rules of intestacy which this Act has created. Moreover, (2) it repeats for testators who *die before* 1926 the previous rule that a reference by will to Statutes of Distribution meant the statutes (other than the Intestates' Estates Act, 1890[1]) which governed the descent of personalty on intestacy before the Act. In each case, however, it provides that this construction does not prevail if the testator has shown a contrary intention in his will.

Thus, in *Re Sutcliffe* (1929)[2] a testator who died in 1875 had bequeathed property to A for life with remainder to the *person or persons who under the statutes of distribution of intestate estates would on A's death intestate be entitled to his property as his next of kin.* A died in 1927. Eve, J., decided that, since the *testator* died before 1926, the property passed to those of A's relations who would have been entitled to it under the old Statutes of Distribution. The will showed no contrary intention, consequently the above provision of the Administration of Estates Act, 1925, s. 50 (2) governed the case.

The same rule was followed also in *Re Sutton* (1934),[3] where a testator, who died in 1923, left property upon trust "for such person or persons who at the decease of my wife shall be of my blood and of kin to me and who under the statutes for the distribution of the personal estates of intestates would be entitled to my personal estate if I were to die immediately after the death of my wife intestate."

But in each of these cases, *had the testator died after* 1925, the matter would have been governed by s. 50 (1) of the Act of 1925; and the beneficiaries would therefore have been those persons who succeed to property under the *new* intestacy rules.[4]

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not make the parties blood relations of each other; hence she (or he) cannot be "next of kin" to the deceased by virtue of the marriage: *Garrick* v. *Lord Camden* (1807), 14 Ves. 372. But see note 4 (*post*).

[1] The Act of 1890 merely benefited the intestate's widow (not next of kin). See previous note; also *Re Morgan,* [1920] 1 Ch. 196.

[2] [1929] 1 Ch. 123.

[3] [1934] 1 Ch. 209.

[4] Moreover, the words of this subsection appear to overturn the old rule that *statutory next of kin* does not include the spouse of the person concerned—see p. 144, note 4, *supra.* It enacts that "references . . . to statutory next of kin shall be construed, unless the context otherwise requires, as referring to the persons who would take beneficially on an intestacy under . . . this Act"; and the Act always benefits the husband or wife of an intestate (s. 46). But *semble* the old rule still applies to bequests to "next of kin" *simpliciter.*

Summary.

Thus we have seen that a Court of Construction must attend above all to the testator's will, and must do its best to ascertain his intentions from the words which it contains. Moreover it must usually construe his words in their ordinary natural sense; or, if they have acquired a technical meaning in their technical sense. But if the testator's will shows that he used them in some other or secondary sense, and in what sense he so used them, the Court may accommodate its interpretation of the words accordingly—though in the case of technical words it is at times somewhat reluctant to do so. Moreover, even evidence external to the will may be admitted to show that he was accustomed to give some word or phrase a secondary meaning; but this is rarely done, if at all, in the case of technical expressions; and in some cases, indeed, such external evidence is disallowed by Act of Parliament.[1]

We shall now proceed to consider in greater detail what external evidence of a testator's intentions is admissible in questions of construction.

C. EXTRINSIC EVIDENCE[2]

Extrinsic evidence usually inadmissible.

The general rule is that no extrinsic evidence (i.e. evidence other than the will itself) is admissible in construing a will. Thus, the solicitor who drafted a will is not usually entitled to give evidence before a Court of Construction in order to prove what the testator really intended his will to say. The will must usually speak for itself.

Evidence of Surrounding Circumstances

Evidence of the surrounding circumstances.

The only broad exception to this proposition has been noticed already. Evidence may always be received as to the circumstances in which the testator was situated at the time he made the will, so as to assist the Court to ascertain the meaning of the words which the will contains. Hence, as it is sometimes said, the Court attempts to sit in the testator's chair when it construes his will. Thus it will often be necessary to inquire into the state of the testator's family

(i) State of his family.

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[1] E.g. Administration of Estates Act, 1925, s. 50 ("statutory next of kin"). See also Wills Act, 1837, ss. 24–29.

[2] See Wigram on *Extrinsic Evidence*, 5th ed.

in order to construe gifts to his wife, children, cousins, nephews, etc. Moreover, even if his will specifies a legatee by name (e.g. John Smith), there may well be many persons in the world who bear that name; it is therefore necessary to ascertain what person or persons of that name were known to him when he made his will, in order to decide whom he had in mind. Similarly, it may be that he was accustomed to call some person by a nickname, or that he was in the habit of using some particular word or phrase in an unusual sense whether peculiar to himself or to some local dialect, or even that he made his will in some foreign tongue; and in these cases also evidence may be allowed as to the meaning which such words bore to him. Perhaps, also, it will be necessary to bring evidence as to the state of his property at the time when he made his will (or at his death)[1] in order to ascertain to what property a certain devise or bequest refers.

(ii) Acquaintances.

(iii) His property.

Thus, in *Re Cruse* (1930),[2] a will directed the executors to purchase "£500 War Loan" for X. It was contended that this bequest failed for uncertainty in that it did not specify what kind of War Loan was to be purchased for him. But Farwell, J., accepted proof that the testatrix never possessed any other kind than 5 per cent War Loan as sufficient evidence that she intended 5 per cent War Loan to be purchased for X.[3]

Re Smalley (1929), *Thorn* v. *Dickens* (1906), and *Charter* v. *Charter* (1874), the facts of which we have already examined,[4] provide illustrations of the admission of extrinsic evidence as to the state of the testator's family, and as to nicknames used by him. Moreover, in several cases evidence concerning the persons known to a testator has revealed that his will, though naming them correctly, has added descriptions (e.g. as to their parentage or their relationship to him) which are inaccurate; and in such cases, as we shall see, these false descriptions are ignored.[5] This occurred, for instance, in *Re Fish* (1894),[6] where a testator bequeathed property to "my niece Eliza Waterhouse," and had no such niece; his wife, however, had a grand-niece of that name, who was held to be entitled accordingly.

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[1] See Wills Act, 1837, s. 24, and *post*, Ch. XIII, *A*.

[2] [1930] W.N. 206.

[3] Query whether this evidence was sufficient. The learned judge assumed (in the absence of evidence to the contrary) that the testatrix knew of no other kind than her own, and therefore must have meant five per cent. One would have expected that some additional evidence would be required, e.g. that she habitually used the phrase "War Loan" to mean five per cent War Loan. Nevertheless a similar decision was reached by Eve, J., in *Re Price*, [1932] 2 Ch. 54.

[4] *Supra*, p. 140.

[5] For *falsa demonstratio* see *post*, Section *C*.

[6] [1894] 2 Ch. 83 (C.A.).

Evidence of Testator's Actual Wishes

Evidence of the testator's actual wishes:

The principles with which we have already dealt always stop short of admitting extrinsic evidence of what the testator actually intended. The words of his will, construed in the light of his habits and environment at the time he made it, are the only permissible guide to his testamentary intentions in ordinary circumstances; and it must be admitted that the result so achieved does not invariably coincide with that which the testator desired.

Equivocation.

In one case, however, the Courts receive extrinsic evidence of the testator's actual intentions—e.g. the instructions which he gave to a solicitor whom he employed to draft his will. This highly exceptional procedure is allowed only when an *equivocation* occurs; that is to say, when the words of a will, construed in the light of surrounding circumstances as above described, apply equally well to any one of several persons or things. In such a case as this, extrinsic evidence of the testator's actual intentions may enable the Court to decide which person or property the testator really had in mind when he used the equivocal words. Unless it succeeds in doing so the gift fails for uncertainty; for if one cannot tell which of two or more individuals or things a gift concerns, one cannot logically attribute to it any effect at all.

Thus, in *Doe d. Gord* v. *Needs* (1836),[1] one of the early cases on this topic, a testator who had three houses devised one to "George Gord the son of *George Gord*," another to "George Gord the son of *John Gord*," and the third to "George Gord the son of *Gord*." This third gift did not explain whether the son of George Gord or the son of John Gord was intended. There was therefore an equivocation. Evidence of the testator's actual intentions, however, showed that he had intended the houses for the son of George Gord; consequently this son was the devisee.

Cases of equivocation as between *things* (as opposed to persons) are very rare. In *Richardson* v. *Watson* (1833)[2] a testator devised a "close" (i.e. a piece of enclosed land) to X, and described it in a fashion which was equally applicable to two of his properties. The Court held accordingly that extrinsic evidence of the testator's intentions was admissible to show which of the two closes he intended. But when that evidence was produced it showed that he had wanted X to have both. Therefore, since it did not solve the question *which of the two* was intended, this evidence was held to be inadmissible, and the gift failed for uncertainty.

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[1] 2 M. & W. 129.

[2] 4 B. & Ad. 787.

Equivocations, patent and latent.

Direct evidence of a testator's intentions, other than that which appears from the words of his will, is thus allowed in one case only—*equivocation* as above defined. It should be noted, however, that an equivocation may arise in either of two ways. First, the very words of the will may show that there are two or more persons or things to which a certain devise or bequest may equally well refer—see *Doe d. Gord* v. *Needs* (*supra*). Or, secondly, it may be that the will as it stands shows no signs of the ambiguity; yet when one comes to apply it to the existing circumstances one may find that two or more persons or things exist, each of which is equally amenable to the name or description which the will contains. In the former case one may say that the equivocation or ambiguity is *patent*, for it is apparent from the will itself. In the latter it is *latent*, however, since it is not discoverable until one turns from the will to the existing facts.

Rule the same for either.

Whether an equivocation be patent or latent direct evidence of intention is equally available, as a last resort, if the surrounding circumstances do not solve the ambiguity. It is commonly said that, whereas extrinsic evidence is allowed in order to solve a *latent* ambiguity, no extrinsic evidence is admissible to explain a *patent* ambiguity. But this is obviously inaccurate, so far as wills are concerned; for, as we have seen, extrinsic evidence both of surrounding circumstances and (if necessary) of the testator's actual intentions is available to solve any equivocation, whether patent or latent, in the construction of a will.

Summary

Summary of the above:

(1) The words of the will.

Let us now summarise the foregoing principles by enumerating the sources to which a Court may turn for assistance in construing a will—

(1) The first source is the will itself, each word or clause being construed accordingly to its *primary* meaning, except where the will itself shows that the word or clause was used in some *secondary* sense (e.g. where the "dictionary principle" applies).

(2) The surrounding circumstances.

(2) Next, the Court attempts to apply to the existing facts the intentions which it has extracted from the words used by the will; and for this purpose evidence of surrounding circumstances is received, so as to ascertain what persons and property comply with the descriptions which the will, as above construed, contains. (*a*) If when this is done the evidence of surrounding circumstances brings to light persons and property amenable to the descriptions ascertained from the will, it is conclusively assumed that the words of the will have been construed in the proper sense.[1] (*b*) But if, and only if,[1] it is found that these descriptions do not fit any of the available persons and property, the Court may look further into the surrounding circumstances (e.g. into the testator's habits of speech) in order to ascertain whether the testator used the words in some (and, if so, what) secondary sense. Thereupon, if this evidence shows that he did, in fact, use them in a certain secondary sense, and when so interpreted the descriptions fit the available persons and property, this secondary interpretation will prevail.

(3) Extrinsic evidence of intention.

(3) When a devise or bequest, having been interpreted as above, is found to have used a description which, though purporting to apply to a single individual or thing, is, in fact, equally applicable to two or more persons or things, a case of *equivocation* arises. Here, and here only, extrinsic evidence may be brought of the testator's actual intentions in order to elucidate which of the several persons or things he had in mind.

(4) Failure for uncertainty.

(4) Finally, if the will read in the light of surrounding circumstances fails to identify the donee or the property

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[1] This embodies the rule stated in Proposition II of Wigram on *Extrinsic Evidence* (5th ed.). This proposition was approved by Farwell, J., in *Re Jackson*, [1933] 1 Ch. 237, at p. 242. But the learned judge, finding that the words of the will in their primary sense applied equally well to either of *two* persons, considered himself free to depart from the primary sense, and search for a secondary meaning (as in 2 (*b*)). It is submitted, with great respect, that this was unjustifiable; for the words were perfectly "sensible" when used in their primary sense (Wigram, *op. cit.*, Prop. II), nor did the fact that there were two persons within the description "necessarily exclude the supposition that the words were used in their [primary] . . . sense" (*ibid.*, p. 107). It is therefore submitted that the case was a simple equivocation, and that direct evidence as to *which of the two* was intended was alone competent to prevent failure for uncertainty. Farwell, J., however, construed the words in a secondary sense, and thereby excluded both persons in favour of a third person. As to this case see also *post*, pp. 162–163.

intended for him—and in a case of equivocation if even extrinsic evidence of the testator's actual intentions fails to resolve the ambiguity—the gift is *void for uncertainty.* An exception to this rule exists in favour of gifts for purposes which the law regards as *charitable*; but this exception applies only where the uncertainty relates to the identity of the charity which the testator intended to benefit—not to the property which he desired to bestow upon it. In such a case the Court may direct that the property comprised in the gift be devoted to charitable purposes similar in kind to those which he evidently had in mind, or, as it is usually expressed, the property is applied *cy près.*[1]

Exception in favour of charitable gifts.

D. SUBSIDIARY PRINCIPLES OF CONSTRUCTION

1. Falsa demonstratio non nocet

1. Falsa demonstratio non nocet.

We have seen, in studying the main principles of construction, that the Court's fundamental purpose is to extract and apply the intentions which a testator has signified by his will. If, therefore, a will describes a certain person or thing with sufficient accuracy to establish the identity of the person or thing intended, the Court is able to give effect to it. But let us suppose that a gift, which describes a person or thing satisfactorily, adds further words of description which are false. Will the fact that the description is not wholly accurate invalidate the gift on grounds of uncertainty? Or will the Court overlook the inaccuracy if the rest of the description shows with sufficient clearness what person or thing was intended? The answer to these questions is embodied in the maxim "*falsa demonstratio non nocet.*" An inaccuracy in description does not vitiate a gift if, despite the inaccuracy, the will when read in the light of surrounding circumstances sufficiently enables the Court to identify the person or object in question.

(i) Thus, in *Careless* v. *Careless* (1816),[2] a will contained a gift "to Robert Careless, my nephew, son of Joseph Careless." The evidence of surrounding circumstances showed that the testator had no brother Joseph Careless, but that he had two nephews named Robert Careless. Hence the word "Joseph" was *falsa demonstratio* and was ignored. This, however, left open the question as to which of the two nephews was entitled: for the remaining words of the description were equally applicable to each of them. But extrinsic evidence of the testator's actual intentions was admissible to solve this difficulty, since it involved an *equivocation.*[1]

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[1] This will be done only if the will shows a *general* charitable intention, not restricted to the particular charity which the will attempted to describe. See Keeton, *Law of Trusts*, pp. 135–137.

[2] 1 Mer. 384.

(ii) *Re Price* (1932)[2] is a recent case which pressed the *falsa demonstratio* rule to somewhat extreme lengths. A testatrix bequeathed to X "my £400 five per cent War Loan 1929–1947." The surrounding circumstances showed that she had never held any War Loan, but that she had held £400 National War Bonds and had converted these into other Government loans shortly before making her will. Eve, J., decided that this misdescription was not fatal to the gift, since it was perfectly obvious from the facts that she regarded as "War Loan" any securities which represented the investments she had made to assist the country during the War. Accordingly he construed her words to mean the proceeds of her National War Bonds. Apparently, therefore, all the words of the bequest were rejected as *falsa demonstratio* except "my £400 . . . War Loan"; and even this phrase was read in a secondary sense.[3]

2. Ejusdem Generis Doctrine

2. The *Ejusdem generis* doctrine.

Another subsidiary rule of construction is the *ejusdem generis* rule. We have already seen that the words and phrases of a will must be given their ordinary meanings, unless it is evident that the testator used them in some other sense. Thus, a word which naturally bears a wide generic meaning is construed in that wide sense, unless the will shows that it was intended to bear some more limited significance. Perhaps the most likely method by which a gift may show that it uses a wide word in a limited sense is where that word is linked to a number of expressions which clearly refer only to some narrower class of objects. In such a case, therefore, the Court may restrict the wide meaning of the word, so that it includes only objects of the same kind (*ejusdem generis*) as those which the accompanying expressions describe.

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[1] Similar cases include *Re Halston,* [1912] 1 Ch. 435; and *Re Ray,* [1916] 1 Ch. 461.

[2] [1932] 2 Ch. 54.

[3] Apparently the learned judge took into consideration (*inter alia*) the following surrounding circumstances: (i) that testatrix "was not a woman of any great education," and (ii) that "the will was prepared by a solicitor" whom she had not properly instructed as to the nature of her investments. This explains why the false description was expressed in such a detailed and deliberate fashion. Nevertheless a will is usually regarded as the words of the testator—not of the solicitor who prepared it.

Thus, in *Re Miller* (1889),[1] a testator bequeathed the *books and wine* at his residence to A, the *plate* at his residence to B, and "all the rest of the *furniture* and effects at my residence" to C. At his death it was found that besides the articles specified above the testator kept certain share certificates and banknotes at his residence. The Court was asked to decide whether C was entitled to these shares and banknotes. As a general rule the word "effects" is wide enough to include all personal property,[2] and therefore would include shares and banknotes. But the Court decided that the word must be construed *ejusdem generis* with books, wine, plate, and furniture—the words which preceded it. The testator evidently intended C to take only "effects" of a similar character to those which he had previously described. Consequently the shares and banknotes passed to the residuary legatee.

Although this doctrine is sometimes known as the *ejusdem generis* "rule," it is probably unworthy of that dignity. At the present day it appears to be no more than an illustration of the general principle of construction, whereby a word must be construed in a secondary sense if the will shows that such was the testator's meaning. The so-called "rule" is not usually applied unless the comprehensive word follows *after* the limiting narrower expressions. Most of the cases on the matter have been concerned with the word "effects" (as in *Re Miller*—above). Moreover, many of the decisions thereon have been founded in part on other signs in the will that the testator used the word with a narrow meaning—e.g. that the will concluded with a residuary bequest of all the rest of the testator's personal property to Z, and, therefore, the bequest of "effects" could not have been intended to cover the whole of the personal property.[3]

3. Inconsistent Clauses

3. Inconsistent clauses—the "rule of thumb."

Another so-called rule of construction, of doubtful force at the present day, is said to be available as a last resort when a will contains two clauses which are absolutely irreconcilable with one another. The primary function of a Court of Construction is to extract the testator's intentions from his will. It must, therefore, do its best to reconcile clauses which appear to be inconsistent with each other. It is powerless, however, to receive extrinsic evidence as to what the testator really intended in cases of this nature; for, as we have seen, this can be done only if an "equivocation" arise; and equivocation occurs when words are ambiguous, not when they are contradictory. Hence, if two inconsistent clauses prove to be irreconcilable despite attempts to find in the will or surrounding circumstances some means of reconciling them, the Court has exhausted all the methods ordinarily available for ascertaining the testator's intentions on the matter. Both clauses, therefore, must be held void for uncertainty, unless, indeed, some special rule exists for solving this kind of difficulty. There is ancient authority for stating that in such a case the *latter* of two inconsistent provisions of a will prevails.[1] Nevertheless, although the Courts have often admitted that such a rule exists, they have rarely applied it; and the test which it prescribes is so arbitrary that it is unlikely to be applied again.

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[1] 61 L.T. 365.

[2] *Post*, p. 179, n. 2. The words "goods" and "chattels" also are *prima facie* construed to mean the whole of the testator's personal estate.

[3] E.g. *Hodgson* v. *Jex* (1876), 2 Ch.D. 122. Compare *Re Fitzpatrick* (1934), 78 S.J. 735: "To Mr. de Valera my house and all my furniture and effects." *Held:* the will as a whole showed that "effects" was intended to include all the personalty of testatrix—*ejusdem generis* doctrine not applied.

Thus, in *Re Bywater* (1881),[2] where Jessel, M.R., described it as "the rule of thumb," although both he and the Court of Appeal admitted the existence of the rule, neither he nor the Court of Appeal applied it in that case; and apparently it has never been applied since.

The facts of *Re Bywater* were substantially as follows. A testator bequeathed to his second wife an annuity of £150 *per annum* for the maintenance of her son, but the annuity was not to commence until the daughters of his first wife should reach 21. The final clause of his will, however, suggested that this annuity should be paid at once. It was therefore inconsistent with that part of the bequest which had directed postponement until his daughters should come of age. Jessel, M.R., in the Court of first instance, decided that the final clause prevailed; but he based his decision upon what he conceived to be the testator's intention, reading the will as a whole, not upon the "rule of thumb." The Court of Appeal, however, on somewhat similar reasoning, held that the other clause prevailed. In fact, there was evidence that the final clause had been inserted in the will by mistake, and contrary to the testator's express instructions; but this evidence, being direct evidence of his intentions, was not admissible, since this was not a case of equivocation.

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[1] Co. Litt. 112 (*b*). In a *deed* the rule is said to be that the *former* clause prevails; see *Rose and Frank Co.* v. *Crompton, Ltd.*, [1923] 2 K.B. 261 (C.A.), per Scrutton, L.J., at p. 287.

[2] 18 Ch.D. 17.

Finally, it should be observed that there is no need for the "rule of thumb" unless both of the inconsistent clauses appear in the same will or codicil. If a will makes a certain provision (e.g. bequeaths all personalty to A), and a later will or codicil contains an inconsistent clause (e.g. all personalty to Z), the latter clause prevails. This, however, is due not to the "rule of thumb," but to the established principle that a subsequent will or codicil automatically *revokes* any part of an earlier will or codicil which is inconsistent with it.[1]

4. Rule in Lassence *v.* Tierney

4. Rule in *Lassence* v. *Tierney.*

In most cases, as we have already noticed, the Court succeeds in reconciling any apparently inconsistent clauses of a will, without resort either to the "rule of thumb," or to the more catastrophic alternative of condemning both clauses as void for uncertainty; for in most cases a perusal of the will as a whole provides a sufficiently clear indication of the testator's intentions. It is convenient at this point to consider a celebrated application of this method of resolving cases of apparent inconsistency, generally known as the *rule in Lassence* v. *Tierney.*[2]

(Trusts engrafted on an absolute interest—

Sometimes a will provides a devise or bequest of property to (or upon trust for) A for what is ostensibly an *absolute* beneficial interest, but directs in a *subsequent clause* that the property in question is to be held upon trust for A for some *restricted* interest (e.g. for life) and, thereafter, upon trust for other persons (e.g. his children). In a case of this nature one must first decide whether or not the will, taken as a whole, shows an intention to give A the restricted interest only. If it does so, A will get that interest and nothing more.[3] But if there is nothing to show that the restricting clause prevails, the two clauses are read together, and are construed to mean that A is to have (*a*) the *restricted* interest (e.g. for life) in case the interests prescribed for the other persons (e.g. his children) are effective, but (*b*) an *absolute* interest if their interests fail.

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[1] *Supra,* Ch. VI. But by the rule in *Hearle* v. *Hicks* (1832), 1 Cl. & Fin. 20, a *codicil* to a will is construed so as to interfere with that will as little as possible; *supra,* pp. 66–7.

[2] (1849), 1 Mac. & G. 551.

[3] *Re Payne,* [1927] 2 Ch. 1.

If the trusts fail the absolute interest takes effect.)

This construction usually meets the testator's evident intentions; for it reconciles and combines the two clauses, so as to give A the absolute interest in accordance with the first clause if the trusts imposed by the second clause become ineffective (e.g. through lapse).

Thus, in *Hancock* v. *Watson* (1902),[1] a testator bequeathed a share of his property to a certain lady. The will then directed that her share should remain in trust for her for her life, and after her death in trust for such of her children as should reach 25. This remainder for her children was void; for it infringed the rule against perpetuities. The House of Lords therefore applied the rule in *Lassence* v. *Tierney*, and held that she took the share absolutely, by virtue of the original clause in the will. (Had the testator died after 1925 the contingent remainder for the children would not have failed. The age 25 would have been reduced to 21 by the Law of Property Act, 1925, s. 163; and the remainder, so altered, does not infringe the perpetuity rule.[2] Hence the lady would have taken a life interest only.)

Again, in *Re Marshall* (1928),[3] a testator bequeathed property to trustees upon trust to divide it into seven parts and to pay or transfer two of these parts to his son Matthew. The will further provided that Matthew's share should not vest absolutely in him but should be retained by the trustees upon certain trusts for the benefit of Matthew and his children. Matthew outlived the testator, and then died, a *bachelor* and intestate. Accordingly, the trusts imposed upon his share of the property failed; for they were designed for his children, and he had none. Eve, J., therefore, applied the rule in *Lassence* v. *Tierney*, and decided that Matthew took his share absolutely, by virtue of the first clause of the bequest. Hence his share, on his death intestate, devolved upon his administrators as part of his property, and was available for the payment of his debts and for distribution among the persons entitled under the intestacy rules.

It will be seen, therefore, that the rule in *Lassence* v. *Tierney* operates to disappoint the testator's residuary legatee or devisee—or the persons who are entitled under the intestacy rules to his undisposed of property. Admittedly, such persons are entitled to claim everything which he does not

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[1902] A.C. 14.

[2] *Supra*, Ch. X, *D*.

[1928] Ch. 661.

effectively devise or bequeath. Yet, when the rule in *Lassence* v. *Tierney* applies, the failure of the trusts imposed upon the property by the later clause does not leave the property undisposed of; for the absolute gift prescribed by the earlier clause then comes into operation in their stead.

CHAPTER XII

CONSTRUCTION—(*continued*): II. DESCRIPTIONS OF PERSONS

A DEVISE or bequest either describes the objects of the testator's bounty *individually* or, by using some more general description, designates some *class of* persons to benefit from the gift. In this chapter we shall consider (*a*) how descriptions of individuals are construed, and (*b*) what persons can claim to be included in a gift to a class.

A. INDIVIDUALS

Wills usually attempt to identify a devisee or legatee either (i) by stating his name, or (ii) by describing his relationship to the testator or to some other person, or by a combination of these two methods. There are, of course, innumerable other modes of description which may usefully be employed—such as the address at which the donee lives, his title, profession, etc. In fact, descriptions by relationship are responsible for most of the decisions on this subject; nevertheless, the appropriate rules of construction appear to be substantially the same whatever the method of description may be.

(i) Names (with or without descriptions) *prima facie* refer to date of will:

Surrounding circumstances.

As one might expect, the Court begins by assuming, unless the will shows a contrary intention, that a name used in a will relates to some person known to the testator who bore that name (and description, if any) at the date *when the will was made*. Accordingly, if the surrounding circumstances reveal that the testator knew no such person at that time, the gift must fail, unless the circumstances reveal also some person whom he was accustomed to call by the name in question.

Thus, in *Charter* v. *Charter* (1874),[1] the testator, a farmer, had made a will (drawn by a local vicar) in favour of "my son Forster Charter." In fact his son Forster Charter, as the testator was well aware, had died some years before the will was made. Hence at that time there was no one of that name and description known to the testator. The evidence of surrounding circumstances, however, showed that he had two other sons : (i) William Forster Charter, who lived far away and was not on good terms with the testator, and (ii) Charles Charter, who lived with the testator. It showed also that the testator habitually referred to Charles as "Forster." Hence Charles was held to be entitled.

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[1] 7 H.L. 364.

Similarly, in *Re Ofner* (1909),[1] the testator had bequeathed a legacy to "my grand-nephew Robert Ofner." The surrounding circumstances revealed that he had no relative of this name, though he had two grand-nephews named Alfred and Richard respectively. The evidence established, moreover, that at the time of making his will the testator believed Richard's name to be Robert. Accordingly Richard was held to be entitled to the legacy.

It is of interest to note that in *Re Ofner* the evidence which established that Richard was the intended legatee was found in the written instructions which the testator had given to his solicitor for the preparation of the will. These instructions contained the following words: "to my grand-nephew Dr. Alfred Ofner . . . £200, and to his brother Robert Ofner, £100." These words clearly showed that the name Robert was employed by the testator to describe Alfred's brother—i.e. that he referred to Richard when he used that name. But it is important to recognise that this was *not direct evidence of the testator's intentions* ; for such evidence was inadmissible, since there was no equivocation here. It was admitted simply as evidence that the testator was accustomed to call Richard by the name Robert—i.e. it was merely evidence of the surrounding circumstances.

A recent case of the same type is *Re Gowenlock* (1934).[2] Here the testator had made a will in 1930 directing that the residue of his property be divided into four equal parts. Two of these shares were bequeathed as follows: " . . . (3) to my nephew David G., and (4) to my nephew Ernest Alfred G. (sons of my late eldest brother David G.)." The said brother had three sons only: (i) David G.—who accordingly took share (3); (ii) Ernest Bell G.; and (iii) Alfred James G. The question therefore arose whether Ernest or Alfred was entitled to the share bequeathed to "Ernest Alfred G."

Ernest produced, in support of his claim, the drafts of four previous wills (dated 1903, 1914, 1923, and 1926 respectively). Each of these wills had included a legacy to "my nephew Ernest Alfred G.," and each had shown, by stating the legatee's address, etc., that Ernest was the nephew intended. They therefore showed that the testator was accustomed to apply the names "Ernest Alfred G." to Ernest Bell G. Crossman, J., therefore decided that this nephew Ernest was entitled, not because the earlier wills showed that the testator intended to provide for him, but because they showed that the testator was accustomed to describe him by that name.[1]

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[1] [1909] 1 Ch. 60 (C.A.).

[2] 177 L.T. News 95.

If, on the other hand, the surrounding circumstances reveal that when the testator made his will there were two or more persons known to him, *each* bearing the name (and description, if any) which appears in the will, a case of *equivocation* arises. Hence, in such circumstances extrinsic evidence of the testator's actual intentions may be received in order to solve the ambiguity.

Doe d. Gord v. *Needs* (1836)[2] provides a simple illustration of this kind of ambiguity—see page 148, *supra*.

Equivocation resulting from *falsa demonstratio*.

Re Halston (1912)[3] demonstrates that the *falsa demonstratio* rule may leave an equivocation. Here land was devised to "*John William* Halston the son of Isaac Halston." Evidence of surrounding circumstances showed that the testator when he made his will was well aware that Isaac's son John William was dead. The words "John William" were therefore ignored, as *falsa demonstratio*, thus leaving the words " . . . Halston the son of Isaac Halston." The phrase produced an equivocation, for it was equally applicable to any one of Isaac's other sons. Direct evidence of the testator's intentions was therefore admitted to prove which of these sons he had intended to benefit.[4]

Sometimes an equivocation is defined in such a way as to cover cases in which the *falsa demonstratio* rule applies: e.g. "an equivocation arises when the words of a will apply with equal accuracy *or with equal inaccuracy* to any one of two or more different persons or things." Nevertheless, it should be borne in mind that unless the inaccuracy is the same for each person or thing there is no equivocation; consequently, no extrinsic evidence of the testator's actual intentions can be admitted unless the inaccuracy is precisely the same for each.

Thus, in *Doe d. Hiscocks* v. *Hiscocks* (1839),[5] land was devised to "John Hiscocks' eldest son *John* Hiscocks." Evidence of surrounding circumstances showed that there were two sons, of which the elder was named Simon, and the *younger* John. Therefore, as regards the son John, the word "eldest" was inaccurate;

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[1] The real difficulty here was that these earlier wills were not contemporaneous with the disputed will, and therefore did not show conclusively that the testator was accustomed *at the time of making this will* to call Ernest by that name. But the learned judge held that they were nevertheless admissible as evidence of surrounding circumstances.

[2] 2 M. & W. 129.

[3] [1912] 1 Ch. 435.

[4] *Re Ray*, [1916] 1 Ch. 461 is a similar case.

[5] 5 M. & W. 363.

whereas, as regards Simon, the inaccuracy lay in the word "John." Hence, the inaccuracy being different for each, there was no true equivocation; accordingly extrinsic evidence of actual intention was disallowed.

Precisely the same result can be reached rather more easily, however, if we keep the two rules separate, and commence our attack upon such problems with the aid of the *falsa demonstratio* rule alone. It will be remembered that this rule enables one to strike out a false description only if, on viewing the facts, one can plainly see which part of the description is false. In *Hiscocks' Case* (above) it was impossible to tell from the surrounding circumstances whether the word "eldest" or the word "John" was the false description. Consequently, neither word could be eliminated under the *falsa demonstratio* rule. The original description, therefore, stood in its entirety, viz. "John Hiscocks' *eldest* son *John* Hiscocks." This did not accurately describe either of the sons; hence, there was no equivocation, and the gift failed for uncertainty.

(ii) Descriptions without names:

Prima facie refer to date of will.

If the will describes a legatee or devisee without giving his name there is again a presumption, unless the will shows a contrary intention, that the gift was intended for the person, if any, to whom that description applied *when the will was made*. Since, however, the testator has not specified the donee by name, the Court is more easily able to find in his will, read in the light of the surrounding circumstances, an intention to benefit the person who answers that description at some other time—e.g. at the testator's death.

In *Re Whorwood* (1887)[1] a testator bequeathed "to Lord Sherborne and his heirs my Oliver Cromwell cup." Lord Sherborne died before the testator, and the title passed to his son. There was nothing to rebut the presumption that the description "Lord Sherborne" referred to the late peer—who had held the title at the time the will was made. Hence, the Court of Appeal decided that the bequest lapsed.

On the other hand, in *Re Daniels* (1918),[2] a legacy to "the Lord Mayor of London *for the time being*" suggested that the testator was referring to the person who should be Lord Mayor when the testator died, and was construed accordingly.

Similarly, if a testator bequeathed property to "A's wife," this means *prima facie* the woman to whom A was married when the will was made—*Re Coley* (1903).[1] Nevertheless, the will read in the light of surrounding circumstances may show that some future wife was intended—e.g. if A was unmarried at the date of the will.[2] Moreover, if the will read as a whole shows a general intention to provide for A's family, the Court may conclude that the gift was intended for whatever woman is A's wife when the testator dies. Thus, a second wife may benefit, although A was married to a former wife at the date of the will.[3]

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[1] 34 Ch.D. 446 (C.A.).

[2] 87 L.J. Ch. 661.

Similar principles have been applied to a devise or bequest to "the eldest son of A."[4]

Primary and secondary meanings of descriptions by relationship:

When a will describes a legatee or devisee by stating his relationship to the testator, or to some other person, the *primary* meaning of the descriptive words must be followed unless it is clear from the will itself or from the surrounding circumstances that the words were used in a *secondary* sense. Hence, words descriptive of relationship are normally taken to refer (i) only to persons of the *specified degree* of relationship, and (ii) only to *legitimate* relations, and (iii) only to *blood* relations (as opposed to relations by marriage—or "affinity").

"Grand-children."

In *Re Hall* (1932)[5] a testator gave property by his will to his "grandchildren *of any degree*" who should be living at A's death. Thus the will itself showed that the testator was using the word "grandchildren" in a secondary sense. Accordingly the gift was held to include not only grandchildren, but also great-grandchildren and great-great-grandchildren who were living when A died; i.e. the words were construed to include all legitimate descendants other than children.[6]

"Nephew."

In *Re Jackson* (1933)[7] a gift by will to "my nephew Arthur Murphy" was construed in the light of surrounding circumstances to mean an illegitimate nephew of that name, although the testatrix had two legitimate nephews of the same name.

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[1] [1903] 2 Ch. 102.

Re-publication.

[2] *Peppin* v. *Bickford* (1797), 3 Ves. 570. If the will was *republished* by a subsequent codicil which refers to that will, this may serve to bring the date of the will down to the date of the codicil—e.g. if at the time of making the codicil testator knew that A's wife had died since the will was made. Thereupon a subsequent wife may be entitled: *Re Hardyman*, [1925] 1 Ch. 287. In fact there was republication, it would seem, in *Re Whorwood* (*supra*); but apparently the point was not raised.

[3] *Re Drew*, [1899] 1 Ch. 336.

[4] *Meredith* v. *Treffry* (1879), 12 Ch.D. 170; *Bathurst* v. *Errington* (1877), 2 A.C. 698.

[5] [1932] 1 Ch. 262.

[6] Cp. *Re Ridge* (1933), 149 L.T. 266 (C.A.): a gift of residue to "nephews," and a legacy to a named great-nephew describing him as "nephew," *held* insufficient to bring the dictionary principle into play so as to enable great-nephews to share in the residuary gift.

[7] [1933] 1 Ch. 237.

This decision appears to have been based in part upon the fact that the illegitimate nephew was married to a legitimate niece of the testatrix and was therefore a legitimate nephew by marriage though illegitimate by blood. It was also strengthened in that the surrounding circumstances showed that this particular nephew was on terms of close friendship with the testatrix. But the decision appears to be open to criticism;[1] and the learned judge admitted that had there been only *one* legitimate nephew, the established rules of construction would have compelled him to decide that the legitimate nephew was entitled. (See next paragraph.)

"Niece."

In *Re Fish* (1894)[2] a testator left property to "my niece Eliza Waterhouse." He had no niece; but his wife had two grandnieces, both named Eliza Waterhouse, one of whom was legitimate and the other illegitimate. The Court of Appeal, though suspecting that the illegitimate grandniece by affinity was really intended, was unable to find in the will or in the surrounding circumstances any sufficient indication that the words were used in that sense. Accordingly it decided (i) that "niece" was here used to mean *grandniece by affinity*; (ii) that it could not be construed to mean an illegitimate relative, since there was here a legitimate relative of that degree who complied with the description; and (iii) that there was no "equivocation" here, for there was only one person to whom the description was applicable when construed as above; hence extrinsic evidence of the testator's actual intentions was not admissible.[3]

"Wife."

Similarly, as we have already seen, although the description "*wife*" primarily means "*lawful* wife," the will read in the light of surrounding circumstances may show that the testator used it in the sense of "*reputed* wife"—e.g. *Re Smalley* (1929)—see page 140 (*supra*).

"Issue."

Another illustration occurs in the interpretation of gifts to "*issue.*" Although this word in its primary sense signifies *legitimate* descendants of *any degree*, the context or surrounding circumstances may enlarge its meaning so as to include illegitimate descendants, or may restrict it to children only.[4]

B. CLASS GIFTS

***Prima facie* refer to the date of the testator's death.**

We have already discussed, when dealing with perpetuities,[5] those rules of construction which decide when a class closes. As a general rule, the class includes only those persons who

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[1] See page 150 (*supra*), note 1.

[2] [1894] 2 Ch. 83 (C.A.).

[3] Hence it is sometimes said that there can be *no equivocation between legitimates and illegitimates.*

[4] E.g. *Re Sutcliffe,* [1934] 1 Ch. 219; *Re Burnham,* [1918] 2 Ch. 196; *Re Birks,* [1900] 1 Ch. 417 (C.A.).

[5] *Supra,* Ch. X, *D*; pp. 125–128.

(Yet the class may expand after his death in two cases.)

are members of that class at the *testator's death.* Thus, the class cannot usually expand after the testator's death so as to let in persons who subsequently come within the prescribed description. It may expand, however, if the will prescribes a general gift among the members of a class, and no members of the class have come into existence at the time of the testator's death, or (if the gift is postponed or contingent) until the period of distribution.

Thus, a bequest of £100 *to each of the children of A* includes only such children as are in existence when the testator dies; and cannot include any children born to A after the testator's death—whether the gift is immediate or not.

An immediate bequest of £1000 *among the children of A* includes children born after the testator's death only if no such children were in existence when he died.

In a *postponed* general gift among a class, however, such as "£1000 to A for life and *after A's death* for his children equally," the class of children entitled includes both any who are in existence when the testator dies *and* all born at any future time before the period of distribution (i.e. A's death).[1]

Hence class gifts do not lapse.

An important consequence of the rule that a class refers only to persons who are members of it at or after the testator's death is that class gifts are outside the law of *lapse*—unless, of course, the facts show *no* members of the class can come into existence.

Let us suppose that a testator bequeathed £1000 equally between the children of A. At the time when the will was made A had 5 children; but one of them *died before the testator.* What happens to the deceased child's share or interest? The true answer is that the will never attempted to give him any interest; for it is read to mean, unless it shows a contrary intention, "the children of A living at my death." Hence the 4 surviving children take the entire sum between them, and the residuary legatee (or persons entitled on intestacy) cannot claim that one-fifth of the legacy lapsed and fell into residue.[2]

What is a class gift.

At this point it is well to attempt some formal definition of a class gift, in order that we may readily distinguish such a gift from a gift to individuals. In the words of Lord Davey,[1] "*prima facie* a class gift is a gift to a class, consisting of persons who are included and comprehended under some general description, and . . . it may be none the less a class because some of the individuals of the class are named." The test, therefore, is whether the gift is to those persons who fall within a *general description*—e.g. a gift to the children of A, or to the nephews of the testator. If so it is still a class gift, although it may exclude or include one or some of the class by name—e.g. to the children of A *including his son Henry*,[2] or "to my husband's nephews and nieces *other than A and B*.[3]

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[1] It matters not that any such child dies before the period of distribution. In such a case his personal representatives take in his stead: *Re Sutcliffe,* [1934] 1 Ch. 219. *Aliter,* of course, if the gift is expressed to be *contingent* on survival at the period of distribution; e.g. "to A for life and after A's death to *such of* A's children *as outlive him.*"

[2] See *Kingsbury* v. *Walter,* [1901] A.C. 187.

Composite classes.

Moreover, even if one general description does not cover all the persons to whom a gift is made, it may yet be a class gift. Thus, the testator may create a *composite class* by his will—e.g. "to the children of A and the children of B"—which really amalgamates two or more classes into one. Again, he may create some *artifiicial class*, such as "to X and the children of B." But *prima facie* gifts of the latter kind are not class gifts, unless (as Lord Davey said[4]) "there is to be found in the will a context which will show that the testator intended it to be a class gift."

In *Kingsbury* v. *Walter* (1901)[5] a testator had bequeathed property (subject to a life interest for his widow) to "A and the child or children of his sister B who should attain the age of 21 years . . . as tenants in common." A was a niece of the testator and was 20 years of age when the testator made his will: she was therefore a likely person to be classed with the children of his sister. She died (aged 35) before the testator. The question therefore arose whether the will showed an intention to make her an individual gift—which would lapse on her death before him, or whether it showed an intention to benefit her merely as one of a class of persons. The House of Lords decided that the will, read in the light of surrounding circumstances, showed an intention to include her in an artificial class together with the children of B. Consequently her death did not lead to the lapse of her presumptive share, but operated merely to enlarge the interests of the other members of the class.

On the other hand, *in Re Venn* (1904)[6] Joyce, J., refused to construe residuary legatees as an artificial class where the residue was bequeathed to a niece for life and after her death equally between *her brothers and sisters and X*, *Y*, *and Z.* X and Y were similarly related to the testatrix, but Z was a stranger in blood. The learned judge held that there was no evident intention in the will to create a class, and that "the person to take have no common quality or characteristic." Hence, each person individually was bequeathed an equal[1] share of the residue, and on the death of X before the testatrix his share lapsed and devolved upon her next of kin.

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[1] *Ibid.*, at p. 192.
[2] E.g. *Re Jackson* (1883), 25 Ch.D. 162.
[3] E.g. *Dimond* v. *Bostock* (1875), 10 Ch. 358.
[4] *Kingsbury* v. *Walter* (*supra*), at p. 193.
[5] [1901] A.C. 187.
[6] [1904] 2 Ch. 52.

C. OTHER RULES OF CONSTRUCTION APPLICABLE TO GIFTS TO INDIVIDUALS AND TO CLASS GIFTS

Gifts to Survivors

1. Gifts to "survivors."

(*a*) Surviving when?

When property is devised or bequeathed to the "*survivors*" of certain individuals or members of a class, or to those "*surviving*," the gift is normally construed to mean those who are living at the *period of distribution.* This is usually known as the *rule in Cripps* v. *Wolcott*,[2] and like other rules of construction it applies only when the will shows no contrary intention.[3]

(i) Hence an *immediate* gift to "the survivors of X, Y, and Z" (or to "the surviving children of A") is taken to mean those who are surviving at the death of the testator.

(ii) But a gift to A for life and *after his death* to the survivors of X, Y, and Z (or to "A for life remainder to his surviving children") is usually taken to mean those who are surviving at the death of A; for in the case of such a *postponed* gift the property is distributed when A dies.

(*b*) Primary sense.

Like other words, the word "survivors" and similar expressions must be given their normal meanings unless the will, construed in the light of surrounding circumstances, shows that they are used in a secondary sense. This is usually known as the *First Rule in Re Bowman*;[4] and we have already observed an illustration of its application in *Gilmour* v. *MacPhillamy* (1930).[5]

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[1] That *each* was to have an equal share (not half between brothers and sisters, and half between X, Y, and Z) was decided on reading the will *in the light of a subsequent codicil thereto.* This was done also in *Weeds* v. *Bristow* (1866), 2 Eq. 333.

[2] (1819) 4 Madd. 11.

[3] *Inderwick* v. *Tatchell*, [1903] A.C. 120.

[4] (1889), 41 Ch.D. 525.

[5] [1930] A.C. 712; *supra*, p. 140. See also *Re Mears*, [1914] 1 Ch. 694.

Occasionally, however, the Court has been able to read the word "survivors" in a secondary sense as meaning "others." When this is done the Court is sometimes said to apply the *Second Rule in Re Bowman.*

(c) Secondary sense.

Let us suppose that a testator dies, having bequeathed property to trustees upon trust for his four sons A, B, C, and D, for their respective lives, and on the death of any son his share to be divided among his children, *but if A, B, C, or D dies without children his share is to be divided among the survivors.* Let us further suppose that A dies after the testator, leaving children, that B then dies, leaving no children, and that C and D are still alive. What will happen to B's share? The strict meaning of the word "survivors" includes only C and D, who have outlived B. Consequently, the children of the deceased A can claim no part of B's share.[1]

If, however, the context shows that "survivors" means "others," the deceased A would not be precluded from participating in B's share. A's children would therefore benefit from it equally with C and D. This construction is usually adopted if the gift concludes with a provision that the whole of the fund shall pass to some other person (e.g. X) in case *all* the four sons die without leaving children. But this, of course, is not the only way in which a will may show that the word "survivors" is employed in a secondary sense.[2]

Sometimes, moreover, the context of the will shows that the word "survivors" bears a meaning intermediate between "survivors" and "others"—viz. that the share of one who dies without issue shall be divided among the *survivors and any others who have already died leaving issue*—thus excluding any who have already died childless.[3] This construction is likely to be adopted when there is a final gift over on the death of *all* without children (as in the previous paragraph) coupled with further evidence from the context that the primary object of the fund is to benefit the children of the donees—e.g. where the share of each donee is settled.[4]

Special Powers of Appointment

A special power of appointment, as we have already observed, is a power to appoint another person's property

9. Special powers of appointment.

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[1] *Gilmour* v. *MacPhillamy,* [1930] A.C. 712.

[2] *Powell* v. *Hellicar,* [1919] 1 Ch. 138.

[3] Similarly the word "*others*" may be construed to bear this intermediate meaning if the context shows that this was intended: e.g. *Re Crosse,* [1933] W.N. 36.

[4] E.g. *Lucena* v. *Lucena* (1877), 7 Ch.D. 255.

(i) Among a class.

which restricts the appointor's power of selection to the members of a specified class or group of individuals. As one might expect, a bequest which empowers a person to appoint property among a specified *class* is construed like other class gifts. Hence, an immediate bequest "*to such of the children of A as X shall appoint*" is restricted, if there are children of A in existence at the testator's death, to those children only; whereas, if no such children are in existence when the testator dies, the class includes any future children of A. Accordingly, X can appoint to *any* child of A if none existed at the testator's death; but, if some were already in existence when the testator died, X's power of appointment is restricted to them.[1]

(ii) Default of appointment.

In normal cases a power of appointment over property is coupled with a *gift over on default of appointment,* which prescribes the destination of the property in case no appointment is made. If, however, no such "gift over" is expressed in the deed or will which created the power, the property on default of appointment reverts to the donor or testator as a general rule, for it is undisposed of.[2] But sometimes the document which creates a special power shows that the specified class or individuals are intended to benefit *whether an appointment is made or not.* In such a case, on default of appointment the members of the specified class or group of individuals share the property equally between them. A special power which shows this intention is known as a *power in the nature of a trust.*[3]

Falsa demonstratio

3. *Falsa demonstratio*

The general principles of construction described in the previous chapter are as applicable to class gifts as to other devises or bequests. A common illustration of the *falsa demonstratio* rule, for example, occurs when a will contains a gift of property to a specified class, but erroneously states the number of its members. Thus, a bequest to "the *three* children of A," when A had four children at the date of the will, is construed as a bequest simply to "the children of

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[1] *Paul* v. *Compton* (1803), 8 Ves. 375.

[2] E.g. *Re Combe,* [1925] Ch. 210.

[3] *Burrough* v. *Philcox* (1840), 5 My. & Cr. 73. See also Keeton, *Law of Trusts,* pp. 8–9.

A."[1] But if the admissible evidence shows that the testator purposely restricted the gift to the fixed number of members —e.g. if it is shown that he had no knowledge that a fourth child had been born—only those he intended to benefit are entitled, and the *falsa demonstratio* rule does not apply.[2]

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[1] *Garvey* v. *Hibbert* (1812), 19 Ves. 125; *Re Sharp*, [1908] 2 Ch. 190.

[2] *Re Mayo*, [1901] 1 Ch. 404; *Re Whiston*, [1924] 1 Ch. 122.

CHAPTER XIII

CONSTRUCTION—(*continued*): III. DESCRIPTIONS OF PROPERTY

A. WHAT PROPERTY IS COMPRISED IN A GIFT BY WILL

Will speaks from death as regards descriptions of property—

SECTION 24 of the Wills Act, 1837, enacts as follows: "... every will shall be construed, with reference to the real estate and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will." Hence, descriptions of property, unlike descriptions of individuals, must ordinarily be taken to include only property which answers to that description at the *death of the testator.* Moreover, this general rule of construction, unlike the rules concerned with descriptions of persons, can only be excluded by evidence of a contrary intention *apparent from the will*; evidence of surrounding circumstances would, therefore, appear to be inadmissible to displace the general rule. Nevertheless, the Court is inclined to allow evidence of surrounding circumstances to be taken into account for this purpose, despite the words of the section.[1]

Unless a contrary intention "appear by the will."

Thus, a gift by will of "all my land" (or "all my property") normally includes all land (or property) to which the testator is entitled at the date of his death, and is not restricted to that which he had when he made the will.[2]

In *Re Bancroft* (1928)[3] a testator had bequeathed "all my rights in connection with the play 'Diplomacy' to X." After making his will he contracted to sell the film rights of this play for a certain sum; but he died before the money was paid. It was held that his words spoke from his death (by virtue of s. 24), and that the bequest to X therefore included the benefit of this contract.

On the other hand, a testamentary gift, which is so worded as to show clearly that the gift refers only to property which answers a certain description *at the date of the will*, is sufficient to exclude the general rule. Thus, in *Re Reeves* (1928)[1] a testator bequeathed "my present lease" of certain premises to his daughter. This lease expired 3 years after he had made the will, and he thereupon took a fresh lease of the premises. On these facts the daughter evidently had no claim to the new lease; for the bequest referred only to that lease which he held when he made the will. But, fortunately for her, the testator confirmed his will by a codicil some years after taking the new lease of the premises. This operated to bring the date of the will down to the date of the codicil. Consequently the daughter's bequest included the new lease, for it was his "present lease" at the date of the confirming codicil.

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[1] E.g. *Re Portal and Lamb* (1885), 30 Ch.D. 50, 55; *Re Evans,* [1909] 1 Ch. 784, 786. But even here opinions differ as to whether the circumstances at the testator's death, or those existing when he made the will, should be consulted. Presumably, if the Act allows either, only the facts at the date of the death can be admissible.

[2] The converse was the rule as regards *real* property before the Wills Act, 1837.

[3] [1928] Ch. 577.

Similarly, in *Re Sikes* (1927),[2] a bequest of "my piano" was held to exclude the section and to refer only to the piano which belonged to the testatrix when she made the will. She sold the piano subsequently, and acquired another before she died. The bequest was therefore adeemed.

General Devises or Bequests

General devises or bequests (including gifts of residue).

When a devise or bequest is of a *general* character, not attempting to restrict the gift to specific property, but giving some *general description* which is capable of including a number of properties, it is said to be a "general" devise or bequest. Such a devise or bequest may either comprise *all* property of the testator which falls within the stated general description (e.g. "all my property to A," or "all my land to A"), or it may take the form of a *residuary* gift comprising only such property of the given description as has not been devised or bequeathed elsewhere in the will (e.g. "all the rest of my property to A," or "all the rest of my land to A"). It is now necessary to ascertain what property these general devises and bequests will include.

Include testator's equitable and future interests in property within the description.

In the first place they include, unless the will shows a contrary intention, all interests which the testator has at his death in any property which falls within the given general description. Hence, they include both his *legal* and his *equitable* interests in such property—though not, of course, property which he holds as a mere trustee;[3] and whether his interest is *in possession* or is a *future* interest in property it is equally included in the gift. Indeed, the only interests in property which cannot, from their very nature, pass under a general devise or bequest, are his *life* interests and any interest which he held *jointly* with other persons; for these, as we have already observed, end with his death.[1]

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[1] [1928] Ch. 351. [2] [1927] 1 Ch. 364.

[3] Trust property passes on the death of a trustee to the surviving trustees, if any. If there are no other trustees surviving it devolves upon his personal representatives. In neither case can he devise or bequeath it by his will. Administration of Estates Act, 1925, ss. 1, 2; Trustees Act, 1925, s. 18.

Thus a devise of "all my land," or of "all my real estate" includes a future interest in land or real estate. Hence, if land is held by trustees upon trust for X for life with remainder upon trust for Y in fee simple, and Y dies having devised "all my real estate to Z," this devise will include his equitable remainder in fee simple.[2]

Similarly, a general devise of all the testator's lands includes land which he had contracted to buy but which had not been conveyed to him at the time of his death; for the vendor, by virtue of the contract, became a trustee for him, and consequently the testator had an equitable interest in the land when he died.[3]

A general residuary gift includes property comprised in void devises and bequests:

If a general devise or bequest is *residuary* this pre-supposes that some of the testator's property which would otherwise fall within the general description has been devised or bequeathed elsewhere by some other clause in the will, e.g. "I bequeath £1000 to A, and *all the rest of my personal property to B.*" A residuary gift, therefore, though described in a general manner, does not carry any property of the given description which has been effectively devised or bequeathed by the testator to some other person. Nevertheless, as we have already seen,[4] a residuary gift does carry even such property if that devise or bequest fails—e.g. by lapse or illegality. Admittedly, it does so only if the will shows no contrary intention; but the fact that a testator unsuccessfully attempted by his will to devise or bequeath *specific* property to A does not of itself show that he wished to exclude it from the residuary gift should the devise or

Unless the will shows a contrary intention.

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[1] *Supra,* Ch. V, *A.* Even his *entailed interests* may pass under a general devise or bequest if he is *in possession,* provided that the devise or bequest refers to entailed property—e.g. "all my property including my entailed property." See Law of Property Act, 1925, s. 176.

[2] *Church* v. *Mundy* (1808), 12 Ves. 426; 15 Ves. 396. *Aliter* if the trustees hold *upon trust for sale,* for in that case Y's equitable interest would be in *personalty*—in consequence of the equitable doctrine of conversion: *supra,* Ch. VIII, *A.*

[3] *Acherley* v. *Vernon* (1725), 10 Mod. 518. The vendor, however, has an equitable lien on the land for the price. Hence the devisee takes the land subject to this liability if the price has not yet been paid—see Administration of Estates Act, 1925, s. 35.

[4] *Supra,* Ch. V, *C,* s.t. "Lapse."

bequest to A be inoperative.[1] Nor is it a sufficient expression of a contrary intention that the residuary gift purports to apply only to property not otherwise disposed of by the will (e.g. "my real estate not hereinbefore devised"); for property is not disposed of (or "devised") by a disposition which fails.[2]

Hence, we have the rule that lapsed and void bequests fall into residue unless the will shows a contrary intention; and by section 25 of the Wills Act, 1837, this rule is now applicable also to lapsed and void *devises of real property.* Accordingly, the presence of an effective residuary gift excludes the persons who are entitled by the intestacy rules to the testator's undisposed of property.

Thus, in *Re Deloitte* (1926),[3] a lady bequeathed £25,000 to trustees upon trust to pay £500 *per annum* to her niece for life, and to accumulate the surplus income therefrom, and on the death of the niece to divide the capital and accumulated income among her children. The testatrix had bequeathed the residue of her property to X. This direction to accumulate was good for only 21 years after the death of the testatrix (*supra*, Ch. X, *E*). Hence the surplus annual income from the expiration of that period to the death of the niece fell into residue in favour of X. (Had there been no residuary gift this surplus income would have belonged to the persons entitled under the intestacy rules to the undisposed of property of the testatrix.)

Aliter a gift of the residue of a particular property.

Although a residuary gift must be a devise or bequest by *general description*, it may be restricted to some limited kind of property—e.g. "the rest of my *land*" (or *chattels*, or *real estate*, or *personal estate*). If, however, it be described in some more particular fashion—e.g. "all the rest of my land *in the parish of X*"—it is a *specific* gift, and, therefore, will not include lapsed or void gifts within that description, unless it shows a clear intention to do so.[4]

Lapsed share of residue does not fall back into residue.

We have already observed that a lapsed or void *share of residue* does not fall back into the residue, but goes to the persons who are entitled by the intestacy rules to the testator's undisposed of property.[1] This is likely to happen when a residuary gift is devised or bequeathed to *named* persons in equal (or other) shares; but it is unlikely to occur in a class gift, for, since a class is not usually ascertained until the testator dies, lapse is extremely rare in such a case.[2]

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[1] *Re Spooner's Trusts* (1851), 2 Sim. N.S. 129.

[2] See *Mason* v. *Ogden*, [1903] A.C. 1.

[3] [1926] 1 Ch. 56.

[4] *Springett* v. *Jenings* (1871), 6 Ch. 333. Compare *Re Davies*, [1928] 1 Ch. 24, which involves a different principle, viz. that a codicil must be read so as to interfere with the will as little as possible. The will devised "all my farms in B parish" to D. A later codicil thereto devised a farm subsequently purchased in that parish to Z. The devise to Z failed; therefore the devise to D stood unaffected by it, and so included all the testator's farms in that parish. See also *Ward* v. *Van der Loeff*, [1924] A.C. 653.

Unless the will shows a contrary intention.

Even a residuary gift to named persons, however, may show an *intention* that any share which fails shall fall back into the residue, and thus augment the other shares; and if, indeed, the gift of residue is to the named persons *jointly* (i.e. not in shares) the right of survivorship which exists between joint tenants itself suggests that if one loses his interest it is intended to accrue to the others.

In *Re Woods* (1931)[3] a testatrix bequeathed her residuary estate to trustees upon trust for her four children, A, B, C, and D, *or such of them as should be living at her death*, in equal shares. She then revoked B's share by a subsequent codicil. Had it not been for the words in italics this share, being a share of residue which failed, would have passed to the persons entitled on intestacy. But the phrase italicised showed that if the share of any child should fail through *lapse* it was intended to fall back into the residue; and it was therefore held to show a general intention that those of the children who were capable of taking an interest should share the whole of the residue between them. Hence, A, C, and D took the entire residue equally—including the revoked share originally bequeathed to B. [This bequest, since it spoke of "shares," was to the children *in common*. Had the bequest been to them *jointly* it would appear that the same result would have been reached even had the words italicised been omitted; for joint interests are designed for the purpose of keeping the property together as a whole.]

In *Re Palmer* (1893)[4] the facts were somewhat similar. But in this case the codicil which (partially) revoked B's share of the residue expressly directed that it was to fall back into the residue. The testator's intention was therefore perfectly obvious on the point.

General gift (whether residuary or not) may exercise a power of appointment.

Until now we have considered only what property belonging to the testator is included in a general devise or bequest. We must now consider whether it can include property over which he has merely a power of appointment. If he is empowered to appoint such property by will, he is clearly able to exercise that power by a devise or bequest which refers to it *specifically*, provided (of course) that the will complies with the formalities prescribed by the Wills Act.[1] Moreover, section 27 of the Act provides that even a *general* devise or bequest includes property which the testator has "*power to appoint in any manner he may think proper*," though only if the property in question falls within the general description which the devise or bequest gives, and only if the will shows no contrary intention. Hence, a general devise or bequest—such as "all my (real) property to X" or "the residue of my (personal) estate to X"—may include property which the testator has an *unfettered* power to appoint. But if the power in any way restricts his choice, the section does not apply; consequently, a mere general devise or bequest is incapable of carrying the subject-matter of such a power of appointment. Hence, a devise or bequest by general description does not include property which the testator has power to appoint if the power limits his choice to certain persons, or to a certain class of persons, or even if it empowers him to appoint anyone except a certain person, persons, or class,[2] for in none of these cases has he an unfettered choice.

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[1] *Supra*, Ch. V, *C*, s.t. "Lapse." *Re Forrest*, [1931] 1 Ch. 162—*revoked* share of residue goes as on intestacy likewise.

[2] *Supra*, Ch. XII, *B*. See also *Re Dunster*, [1909] 1 Ch. 103: presumptive share of prospective member of the class revoked by codicil—no lapse.

[3] [1931] 2 Ch. 138.

[4] [1893] 3 Ch. 369 (C.A.).

Provided that the power does not fetter the testator's choice.

Hitherto, we have assumed that section 27 of the Act of 1837 merely allows an unfettered power to be exercised by a *general* devise or bequest, whether residuary or not. In fact, however, the section is somewhat wider than this. In the first place, it expressly extends to every general devise of *real* estate described in a general manner, even if the description restricts it to real estate in a particular locality or in the occupation of some named person. Secondly, it appears to extend to bequests of *personal* estate whether described in a general manner or not.

Extent of s. 27.

Thus, a bequest of "*all my stock*" *to X* includes stock over which the testator has an unfettered power of appointment; for it is a bequest of personal property described in a general manner, and the given description covers the property in question. Moreover

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[1] Wills Act, 1837, s. 10, enacts that these formalities (writing signed and attested by two witnesses) are sufficient and essential, even if the instrument which conferred the power upon the testator prescribes that the will must observe some other formalities in exercising the power.

[2] *Re Byron's Settlement*, [1891] 3 Ch. 474.

X is entitled even if the will concludes with a residuary bequest of "all the residue of my property" to X.[1]

Moreover it has been held that even a *pecuniary legacy* may operate to exercise an unfettered power of appointing a fund of personalty if the testator's assets are not sufficient to pay the legacy;[2] and even when a testator merely directed his executor to pay his debts out of his personal estate this was held to exercise such a power insofar as the testator's assets were insufficient for the purpose.[3]

Contrary intention.

In view of the fact that section 27 is inapplicable when the will shows a contrary intention, one might be led to expect that a gift of "all *my* property" is incapable of carrying property as to which the testator has but a power of appointment. The section, however, expressly provides that "a general devise of the real estate *of the testator* . . . and a bequest of the personal estate *of the testator*" shall be construed to include property which he has unfettered power to appoint—"unless a contrary intention shall appear by the will." Hence, the fact that a devise or bequest appears to concern only property which belongs to the testator is not of itself sufficient to exclude the section.

Furthermore, a general devise or bequest may carry property as to which the testator has an unfettered power of appointment, although some other clause of the will has made an ineffective attempt to exercise the power.

Thus, if, as in *Re Spooner's Trusts* (1851),[4] a testator who has power to appoint a certain fund in any manner he may think proper, bequeaths this fund to A and all the rest of his personal property to B, the residuary gift to B does not include the subject matter of the power if the bequest to A is valid. But if A dies before the testator, and the appointment accordingly lapses, the fund will pass to B by virtue of the residuary bequest. The mere fact that the testator attempted to appoint to A is not of itself sufficient to show that he intended to exclude B should the appointment prove to be ineffective.

The effect of s. 24 upon s. 27.

We have already seen that section 24 of the Act of 1837 provides that a will speaks from the death of the testator as regards property comprised therein. Hence, a general devise or bequest is capable of exercising an unfettered power of appointment even if the power is not given to the testator until after he has made his will.[1] But, if the testator *dies* before the power is conferred upon him, his will is clearly unable to exercise it, for his will spoke at his death.

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[1] *Re Doherty-Waterhouse*, [1918] 2 Ch. 269.
[2] *Re Wilkinson* (1869), 4 Ch. 587; *Re Seabrook*, [1911] 1 Ch. 151.
[3] *Wilday* v. *Barnett* (1868), 6 Eq. 193.
[4] 2 Sim. N.S. 129.

Thus in *Re Baker* (1934),[2] a testatrix bequeathed her residuary estate to *S absolutely, or, in the event of his predeceasing her, to whomsoever he should appoint by his will.* S died before the testatrix, having bequeathed his residuary property to his widow and children. The Court of Appeal held that this residuary bequest did not exercise the power of appointment; for the will which purported to give him this power did not come into operation until after his death.[3] Hence the property comprised in the abortive power passed to the persons entitled on her intestacy.

Powers of appointment which fetter the testator's choice

If a testator has power to appoint property by his will, but the power is a restricted one, he cannot dispose of the property by his will unless the will (i) expressly refers to the power or to the property to which it relates, or (ii) contains some other indication that it intends to exercise the power.[4] Thus, the will does not exercise the power unless it shows an intention to exercise it. Until the Wills Act, 1837, this rule applied to every testamentary power of appointment; but, as we have seen, such indications of intention are no longer essential if the power enables the testator to appoint "in any manner he may think proper" (section 27)—i.e. if it gives him an unfettered power of selection.

Gift of "Lands"

Gift of "lands" by general description.

(i) Formerly did not include leaseholds if testator had freeholds at date of will.

Before the Wills Act, 1837, a devise of the testator's "*lands,*" whether *simpliciter* or coupled with some *general* description (e.g. as to their locality), was held to include only his *freeholds,* unless the will showed an intention to include leaseholds also. Such a gift, however, was construed to carry his leaseholds if he had no freeholds answering to the description at the time of making his will; for in such a case it was evident that this was his intention.[5] This ancient

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[1] *Airey* v. *Bower* (1887), 12 A.C. 263.

[2] [1934] W.N. 19, 94 (C.A.).

[3] If, as is stated by the head-note, this was properly a case of *lapse,* the result would have been different had S been a child or other issue of the testatrix; for he would be deemed to have died immediately *after* her—Wills Act, 1837, s. 33.

[4] *Re Weston's Settlement,* [1906] 2 Ch. 620.

[5] It will be remembered that a will of freeholds, before the Act of 1837, included only freeholds which the testator held *at the date of his will.*

(ii) Wills Act, 1837, s. 26.

rule, which was known as the *rule in Rose* v. *Bartlett*,[1] has been reversed by section 26 of the Wills Act, 1837. The section enacts that "any general devise which would describe a . . . leasehold estate if the testator had no freehold estate which could be described by it, shall be construed to include leasehold estates of the testator . . . unless a contrary intention shall appear by the will." Thus, the presumption is now that a devise of "lands" is intended to include not only *freeholds* but *leaseholds* also.

Gift of "Real Estate"

Gift of "real estate," etc.

Phrases such as "*real estate*" or "*real property,*" being technical terms, are less readily construed to include leaseholds; for their primary technical meaning restricts them to freeholds only. Hence, the mere fact that a testator had no freeholds when he made his will never justified a departure from their strict legal meaning. Nevertheless, if the devise was locally identified (e.g. "my real estate at Cambridge"), this, coupled with the lack of freeholds, enabled the gift to pass leaseholds situate in that locality.[2] Hence, it would seem that section 26 now enables a devise of "real estate," *locally identified*, to carry leaseholds as well as freeholds—unless a contrary intention appears from the will. If, however, the devise is not locally identified, the section is clearly inapplicable; for the mere lack of freeholds never enabled such phrases as "real estate" to carry leaseholds.

(i) If locally identified *semble*, s. 26 applies.

(ii) Otherwise not.

Thus, in *Re Holt*, (1921),[3] a testator bequeathed all his "personal property" to A, and devised all his "real estate and property" to B. Neither at the date of the will nor at his death had he any real estate (i.e. freeholds); but he held two *leasehold* farms. Sargant, J. (as he then was) decided that B took nothing and that the leaseholds, being personal property, went to A. (It should be noted that the devise to B was not locally identified in this case.)

Gift of "Money"

'Money":

A great many decisions have been given as to the proper construction to be placed upon bequests of "my money,"

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[1] (1631), Cro. Car. 292.

[2] *Butler* v. *Butler* (1884), 28 Ch.D. 66.

[3] [1921] 2 Ch. 17.

"all my money," and similar phrases. At first sight these decisions often appear to be in conflict with one another; but they become comprehensible if the ordinary principle be applied whereby a word must bear its primary meaning unless the will, read in the light of surrounding circumstances, shows that the word was used in a secondary sense.

(i) Primary meaning.

It is now generally agreed that "money" in its primary meaning signifies *cash*, whether it be cash in hand, or in the testator's bank, or in the hands of his agent (e.g. his solicitor).[1] Accordingly, a bequest of "money" includes neither money invested on mortgage, War Loan, bonds, stock, shares, and furniture, nor interests in land, unless an intention to include such be evident when the will is properly construed. On the other hand, a bequest of "all my money" is capable even of carrying the whole of the testator's personal property (including leaseholds) if the will, read in the light of surrounding circumstances, reveals that he used the phrase in this comprehensive sense.[2]

(ii) Secondary meanings.

E.g. rule in *Rogers* v. *Thomas*—"money remaining after payment of my debts"—all personalty.

One case in which this wide construction was usually adopted arose when a testator bequeathed "the money *remaining after the payment of my debts*," or "*after the payment of debts and legacies*." Such a bequest was usually taken to mean "what remains of the fund which is responsible for paying my debts (and legacies)." Accordingly, since the whole of one's personal estate is legally liable to meet one's debts and legacies, such a bequest was construed to carry the entire residuary personal estate.[3]

And now realty also (*sed. qu.*).

Under the modern law *real estate* is now equally liable with personal estate to be taken for the payment of a testator's debts and legacies.[4] It is, therefore, arguable that a will which directs debts (or debts and legacies) to be paid, and which then bequeaths "the remainder of any money" to X, thereby shows an intention to bestow upon X the whole of the residuary estate, both real and personal.[1] This construction, indeed, has actually been adopted by two recent decisions. In one—*Re Mellor* (1929)[2]—there was an express direction to the executors to pay debts, followed by a bequest of "the remainder of any monies." In the other—*Re Shaw* (1929)[3]—a direction to pay debts was followed by a bequest of "any balance of money left after all my expenses have been paid." Each bequest was held to carry the whole of the residuary estate, including both realty and personalty.[3]

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[1] *Re Collings*, [1933] 1 Ch. 920; *Re Gates*, [1929] 2 Ch. 420—including uncashed cheque; *Re Putner* (1929), 45 T.L.R. 325. It includes money in the bank whether on deposit or on current account, and money in G.P.O. Savings Bank.

[2] *Re Cadogan* (1884), 25 Ch.D. 154; *Re Emerson*, [1929] 1 Ch. 128. Compare the words "effects," "goods," and "chattels," which are *prima facie* to be construed as meaning the whole of the testator's personal property, unless restricted or extended by the context: see Hawkins on *Wills* (3rd ed.), pp. 70–72, and *supra*, p. 153.

[3] *Rogers* v. *Thomas* (1837), 2 Keen 8; *Stocks* v. *Barré* (1859), Johns. 54.

[4] Administration of Estates Act, 1925, ss. 32 (1), 34 (3).

Undoubtedly, the gifts of "money" in *Re Mellor* and *Re Shaw* would have been construed in a narrower sense had they been followed by a residuary devise or bequest; for this would have shown that the testator did not intend the word "money" to include the whole of his residuary estate. Apart altogether from such considerations, however, it is submitted that these sweeping decisions should be viewed with caution. It is usually regarded as an established principle of construction that a word can be construed in a secondary meaning only if that word is capable of bearing the meaning in question. And it would appear that the word "money," when weighted with a meaning which includes even freehold land, bears its burden somewhat precariously.

B. WHAT ESTATE OR INTEREST IN THE PROPERTY IS OBTAINED BY A LEGATEE OR DEVISEE

Having discussed the rules which decide what property falls within a given legacy or devise, we must now consider what kind of interest the legatee or devisee obtains in that property. In general, one may say that a will is capable of giving any type of interest, whether large or small, which the testator desires to confer. This proposition is subject to a few reservations; for (1) he cannot give a greater interest than his own, unless he is empowered to do so either by a power of appointment or by a statutory power,[4]

The nature of the interest

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[1] Cf. *Re Emerson*, [1929] 1 Ch. 128: a bequest by codicil of "the residue of money at the time of my death"—no express direction to pay debts—carried only residuary personalty.

[2] [1929] 1 Ch. 446.

[3] [1929] W.N. 246.

[4] E.g. Law of Property Act, 1925, s. 176—the statutory power to devise or bequeath entailed property; *supra*, Chapter V, *A*.

and (2) he cannot create an interest which is disallowed by law.[1] Subject to such reservations, the extent of the donee's interest is determined by the testator's intentions, extracted from his will by the ordinary process of construction.

conferred is a question of construction.

There is, however, an important statutory exception as regards the wills of persons who die after 1925. It applies when a testator attempts to *create an entailed interest* by his will. In such a case, however clear his intention may be, his attempt will fail unless he uses certain technical *words of limitation*. The essential words are "*in tail*" or "*and the heirs of his body*"[2] (though "of his body" is not essential provided that some similar words of procreation—such as "of his flesh" are added to the word "heirs").[3] Before 1926, strict words of limitation were never required in a will: the extent of the interest which passed to a devisee or legatee depended solely upon the intentions which the testator had expressed in his will. Thus, a devise "to A and his seed for ever," or "to A and his descendants,"[4] was capable of conferring an entailed interest before 1926, since the words suggest that the testator so intended; but it cannot have this effect to-day. Indeed, section 130 of the Law of Property Act, 1925—the section which enacts that strict words of limitation are now required—provides that these informal expressions, which would have sufficed to create an entail by will before 1926, shall, if used by a testator who dies after 1925, "create absolute, fee simple or other interests corresponding to those which, if the property affected had been personal estate, would have been created therein by similar expressions before the commencement of this Act."[5]

Exception: strict words of limitation are essential to create an entailed interest. Law of Property Act, 1925, s. 130.

Before 1926 an entail could be created by informal expressions in a will.

Aliter if testator dies after 1925.

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[1] E.g. one which infringes the rules relating to conditions or to remoteness; *supra*, Chapters IX and X.

[2] If the testator desires to restrict the gift to the donee and his *male* (or *female*) descendants, the appropriate words are "in tail *male*" (or "*female*"), or "and the heirs *male* (or *female*) of his body." It may also be restricted to the issue by a particular wife or husband—e.g. "To A and the heirs of his body begotten of his wife Martha."

[3] Law of Property Act, 1925, s. 130 (1). Similar words of limitation were essential to the creation of an entailed interest before 1926 *by deed* (and are so still). The section prescribed that wills must now use the same expressions as were required in a deed before 1926.

[4] E.g. *Re Sleeman*, [1929] W.N. 16. Similarly a devise "to A and his heirs male" might confer an estate in tail male before 1926; *Crumpe* v. *Crumpe*, [1900] A.C. 127.

[5] Subsec. (2). Personalty could not be entailed before the Act. Hence, attempts to entail personalty before 1926 usually conferred an *absolute* interest upon the donee. But this was not invariably the case; see Ch. X, *B*, *supra*, and *post*, p. 188, note 2.

Moreover, the section applies whether or not the will shows a contrary intention. Clearly, therefore, what was formerly a question of construction is now a rigid rule of law. Hence, we must preface our observations upon the construction of devises and bequests, when considering what interests they confer after 1925, by stating that *rules of law* govern (i) the phraseology required for the creation of an entailed interest,[1] and (ii) the effects of those informal phrases which were competent to create an entail when used by a testator who died before 1926, but which cannot do so now.

Gift of Fruit

Gift of the fruit is construed as a gift of the tree which produces it.

Among the rules of construction which determine the extent of the interest which a gift confers—though like other rules of construction it is excluded if a contrary intention appears in the will—is one which is sometimes picturesquely described as the rule that a gift of the fruit from a tree is equivalent to a gift of the tree.[2] In other words, a devise or bequest of all the benefits from a certain property is construed as a gift of the property itself. Thus, if a testator devises the "rents and profits" issuing from his land, the devise normally carries the land, and not merely a right to the income therefrom.

Gift of Tree

Gift of tree includes the fruit.

Conversely, one may say also that a gift of the tree is construed to include its fruit, unless the will shows a contrary intention.[3] Thus, if property is devised or bequeathed to D it is assumed that he is intended to take it beneficially—not as a mere trustee for other persons; he is, therefore, entitled to the income and other benefits therefrom, unless the will clearly indicates that he is to hold it upon trust.[4]

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[1] Section 130 (3) appears to waive technical requirements in one case—where a will (or deed) entails personalty by directing that it be held on trusts corresponding with specified entailed land. Presumably such a direction needs no technical phraseology. But see *Re Jones*, [1934] 1 Ch. 315, where it was held (*semble*) that the actual words of the subsection should be adopted; see 50 L.Q.R., pp. 321–322, for a criticism of this decision.

[2] *Re L'Herminier*, [1894] 1 Ch. 675, 676. A fund was held by trustees upon trust to hold the *income* for such persons as H shall by his will appoint. *Held*: this enabled H to appoint the *capital* of the fund by his will.

[3] E.g. *Re Dickens* (1934), 78 S.J. 898 (C.A.)—copyright of bequeathed MS.

[4] An exception occurs in the case of "Secret Trusts"; *supra*, pp. 100–101.

Moreover, as we have already seen, even if the gift is limited to a mere future or contingent interest in the property it usually carries the intermediate income,[1] unless the will expressly disposes of the income to some other person.

Life Estates by Implication

Life estates by implication.

Although it has always been a strict rule of construction that a will confers no interest upon a person unless it shows a clear intention to do so, there is one case in which an interest may be *implied*. When a testator bequeathed property "*after the death of A*" to the persons who would be entitled to that property if the testator died intestate, it was sometimes impossible to avoid the conclusion that A was intended to take a life interest in the property; for if the gift were construed as giving A nothing, the property, being undisposed of during A's lifetime, would (in the absence of a residuary gift) devolve during this period according to the intestacy rules; consequently, the very persons whom the will attempts to postpone would obtain the property immediately. In such a case, therefore, being unwilling to flout the testator's evident intentions, the Court was accustomed to read into the gift a life interest for A. This was never done, however, if the will contained a residuary gift into which the property might fall until A died; nor was it done if the postponed gift included some only of the persons entitled on intestacy, or included some other person in addition; for none of these cases would produce the impossible conclusion that the very persons whom the testator expressly attempted to postpone are to take their benefits at once.[2]

No longer possible in specific gifts, Law of Property Act, 1925, s. 175.

This rule of construction appears to have been shorn of much of its importance by section 175 of the Law of Property Act, 1925; for the section enacts that every future *specific* devise or bequest now carries the intermediate income from the property, unless that income is "*expressly* disposed of" by the will. A life estate may still arise by implication, however, when a *pecuniary legacy* or a *general or residuary gift* to the persons entitled on the testator's intestacy is postponed by the will during the life of a named person.

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[1] This is not always the case, however, with general pecuniary legacies. See Chapter VII, (*B*), *supra*.

[2] *Re Springfield*, [1894] 3 Ch. 603.

Entailed Interests by Implication

Entailed interest by implication:
(i) Impossible after 1925.
(ii) Possible before 1926, in devise to A with gift over on failure of his issue at any future time.

Since 1925, as we have seen, it is impossible to create an entailed interest without using the appropriate technical words of limitation.[1] Before 1926, however, a devise[2] to A (or to A for life) was construed to confer an entailed interest upon him, if the devise was coupled with a *gift over* whereby the property was to pass elsewhere *on the failure of his issue at any future time*; for this gift over evidently pre-supposed that the gift to A was to continue after his death until all his descendants failed; and the only interest which has this effect is an entailed interest.[3] But this construction was never placed upon a devise when the gift over was so expressed that it could only take effect on the extinction of A's descendants before some specified time. Hence, a devise "to A, but if he leave no issue *at his death*, to B" was not construed as giving A an entail; for the words do not aptly describe the situation which would exist if A had an entailed interest. Section 29 of the Wills Act, 1837, moreover, enacted that henceforth ambiguous phrases such as "die without issue," "die without leaving issue," and "have no issue," which are capable of meaning *either* failure of issue at any future time, *or* failure of issue during the lifetime or at the death of the donee, must be construed to mean lack of issue *at his death*—unless a contrary intention shall appear by the will. Consequently, entailed interests rarely arose by implication in a will made after 1837.[4] And, as already mentioned, they can never arise if the testator dies after 1925.

(iii) But rare after s. 29 of the Wills Act, 1837.

Example: To A, but if he die without issue then to B.

Thus, before 1838, a devise of *real property* "to A, but if he die without issue, then to B," was sometimes construed to mean an indefinite failure of issue at any future time, and thereupon was read to mean "to A in tail, remainder to B." But after the Wills Act, 1837 (s. 29), it gave A a fee simple estate which would pass to B if A had no issue at the moment of his death.

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[1] Law of Property Act, 1925, s. 130. See. p. 182, 1, *supra*, for a minor exception.

[2] Personalty could not be entailed before 1926. Hence a *bequest* (of personal property) could never confer an entailed interest, whether by implication or otherwise.

[3] Moreover, this construction prevented the gift over from infringing the perpetuity rule, for, as we have seen, a remainder after an entailed interest is outside the rule—Chapter X, *D*, *supra*.

[4] Section 29 applies also to bequests of *personalty*. Personalty could not be entailed before 1926—see note 2, *supra*. But the section assisted bequests over on failure of issue; for if construed as conditional on failure of issue at *any future time*, the bequest over infringes the perpetuity rule, whereas if conditional upon the lack of issue *at the death* of a living person, the bequest over is valid.

On the other hand, in a bequest of *personalty* before 1838 "to A, but if he die without issue, then to B," the gift over to B infringed the rule against perpetuities if construed to mean an *indefinite* failure of issue, for personalty could not then be entailed; hence A took the bequest absolutely. But since the Act of 1837 (s. 29) the bequest is construed to mean failure of issue *at A's death*, Consequently the gift over to B is valid; for it is bound to take effect, if it takes effect at all, within the period of a life in being.

[Here it is necessary to mention in parenthesis that section 134 of the Law of Property Act, 1925, has introduced a *rule of law* which applies to every devise or bequest (other than one which confers an entailed interest) which contains a gift over on failure of the donee's issue. It enacts that the gift over becomes void immediately any of such issue reach 21 years of age.[1] Hence a devise or bequest "to A but if he die without issue then to B" becomes a simple gift to A, as soon as any of his issue comes of age; thereupon B is entirely excluded, even if A subsequently dies leaving no issue surviving.]

Gifts Without Words of Limitation

Devise (after 1837) or bequest passes the greatest interest that testator can give, unless a contrary intention is shown by the will.

It is now necessary to consider whether an express devise or bequest to a person, without those words of limitation which operate to confer an entailed interest, will give him an absolute (or fee simple) interest in the property, or whether it will give him an interest for his life only.

The general rule at the present day is that a devise or bequest of property is construed, unless the will shows a contrary intention, to pass the *whole* estate or interest therein which the testator has power to dispose of by his will. Thus, if the testator has an absolute (or fee simple) interest in the property at his death the legatee (or devisee) takes that interest unless the will provides otherwise. Before 1838 the rule was otherwise for devises of *real property*—a devisee obtained only a life interest unless the will showed an intention to give him the fee simple; but section 28 of the Wills Act, 1837, has reversed this ancient rule.[2]

Hence, it is not strictly necessary, at the present day, when a testator desires to give an *absolute or fee simple* interest by his will to A, to insert express words signifying the extent of the intended interest. Nevertheless, if such words are inserted they will exclude any possibility that a Court of Construction may find in the will some suggestion that a lesser interest was intended. Hence, a cautious draughtsman may prefer to frame the gift, if a bequest of personal property, "to A *absolutely*"; or, if it be a devise of real property, "to A in *fee simple*," or "to A *and his heirs*"—for these are the technical words of limitation which are appropriate when one desires to express in a formal manner that a gift of realty is to confer a fee simple interest upon the donee.[1]

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[1] This rule has applied to *real property* since 1882—Conveyancing Act, 1882, s. 10. But the Act of 1925 extends it to personal property also.

[2] Apparently sections 30 and 31 of the Act produce a similar result when the devise is to *executors* or *trustees*; but these sections are somewhat obscure. See *post*, p. 191, n. 2, for the effect on the general rule of an abortive intention to confer an entailed interest.

Hence if an interest is intended to be limited in duration the will should say so.

On the other hand, this presumption that a devise or bequest is intended to carry the whole of the testator's interest in the property renders it essential, when a testator desires to confer a mere life interest upon the donee, that he express this intention clearly in the will. This can best be done by making the gift "to A *for life*," or in similar terms; but no particular phraseology is compulsory—it is enough that the will makes the intention clear. Similar considerations apply whatever form of limited interest is intended—e.g. "to A until he become bankrupt," or "to A for ten years," unless, of course, it is desired to confer an entailed interest upon the donee, in which case strict words of limitation are now prescribed by law.

Exception: annuities *created* by will.

The Courts have decided that section 28 of the Act of 1837 does not apply to an *annuity or rentcharge* which is *created* by a will to issue out of the testator's property; for it is clearly impossible to hold that such a gift passes whatever interest he has power to give in the property. Hence, an independent rule exists for cases of this nature, and the annuity is construed as a mere life interest unless the will shows an intention that it be perpetual.[2] If, however, the testator himself had a perpetual annuity and gave it by his will to A, the gift would carry the testator's entire interest therein unless the will showed a contrary intention.

---

[1] The words "and his heirs" or (after 1881)" in fee simple" were formerly essential to grants of a fee simple estate *inter vivos*. They were never essential in a will, and since 1925 they are no longer essential in a deed—Law of Property Act, 1925, s. 60.

[2] E.g. *Blight* v. *Hartnoll* (1881), 19 Ch.D. 294; *Re Morgan*, [1893] 3 Ch. 222; *Townsend* v. *Ashcroft*, [1917] 2 Ch. 14. The numerous decisions or expressions of a contrary intention often turn upon nice distinctions which complicate this topic when considered in greater detail.

Gift to Several Persons Concurrently

Gift to several persons concurrently.

We have already observed that the same property may be given to a number of persons in such a way as to confer upon them concurrent or contemporaneous interests therein.[1] Concurrent ownership (sometimes loosely described as "co-ownership") can be created in either of two distinct forms: (i) it may confer upon the donees a *joint* interest—in which case the ultimate survivor of them automatically becomes solely entitled to the gift at the expense of those who die before him; or (ii) it may give an interest *in common*, in which case the doctrine of survivorship is inapplicable, and each donee has an undivided *share* in that interest which remains as part of his estate when he dies.[2]

(i) Joint.

(ii) In common.

Concurrent gifts are construed as joint; unless a contrary intention is shown.

Whenever an interest is given to a number of persons concurrently (e.g. "To A, B, C, and D"), the presumption is that they are intended to take it *jointly*, unless the will shows a contrary intention. This is equally the rule whether it is a gift to a class or to named individuals. In most cases, however, testators wish them to take *in common*, and accordingly insert appropriate words which make this intention clear. This can be done by any word or expression which shows that each donee is to have an individual (though undivided) share in the gift—e.g. if the gift to them is expressed to be in certain "*shares*," or to them "*equally*," or "*between*" them; and such words are commonly described as "words of severance." But, naturally, the most unequivocal method of expressing this intention is to state that the gift is to them "*in common*."

E.g. by inserting words of severance.

A gift to several persons is *prima facie* concurrent.

As one might expect, it is sometimes difficult to ascertain whether a gift to several persons intends them to take concurrently or successively. When such a doubt arises the construction adopted must follow the testator's evident intentions if his will when properly construed reveals them; failing such a solution, however, the gift is construed as concurrent. Thus, whereas a gift "to A for life and afterwards to B for life" is clearly intended to give successive interests, a gift "to A and B" confers a joint interest unless the will shows a contrary intention.

---

[1] *Supra*, pp. 12, 51, etc.

[2] There are several methods whereby persons who have a joint beneficial interest can convert it into an interest in common (e.g. by agreement). This is known as "severance," and enables them to avoid the unpopular doctrine of survivorship. But see Law of Property Act, 1925, ss. 1 (6), 36 (2).

Gift "to A and his heirs" or "and the heirs of his body."

It must be remembered, however, that those phrases such as "and his heirs" or "and the heirs of his body" which have acquired a technical significance as words of limitation, have always been interpreted as fixing the nature of the interest conferred by the gift, and are never construed as indications that the donee's heir was intended to take an interest of his own (other than the possibility of inheriting it at the donee's death). Hence, a devise "to A and his heirs" (or "to A and the heirs of his body") merely indicates that A is intended to take a fee simple (or an entailed) interest; and the heir cannot claim that it gives him either a concurrent interest with A or a future interest in remainder,[1] unless the will makes it abundantly clear that it used the words in this abnormal sense.[2]

To A and His Issue

To A "and his issue":

Before 1926 A took an entailed interest if realty, but if personalty an absolute interest concurrently with his issue—unless contrary intention shown.

Sometimes, however, a testator uses some informal phrase—e.g. "to A *and his issue*"—which, though not comprising the technical words of limitation appropriate to confer an entailed interest, may well have been inserted with that intention. Before 1926, as we have already seen, such informal phrases in will were capable of entailing real property. Hence, a devise "to A and his issue" was construed to give A an entailed interest, unless the will showed a contrary intention.[3] On the other hand, a bequest of *personalty* "to A and his issue" was usually construed as a class gift to A and his issue jointly; for personal property could not be entailed before 1926.

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[1] This was so before 1926, even when realty was devised *to A for life remainder to his heirs* (or *the heirs of his body*): rule in *Shelley's Case* (1581) 1 Co. Rep. 93, *b*, abolished by Law of Property Act, 1925, s. 131.

[2] It seems that *bequests of personalty* with words of limitation were more readily construed as a gift to A for life with remainder to his heirs (or next of kin). Query whether this is still the case: see Law of Property Act, 1925, ss. 130, 132; also pp. 142–3, *supra*. If not so construed such a bequest conferred an absolute interest upon the donee before 1926. Since 1925 personalty can be entailed, however; hence a bequest "to A *and the heirs of his body*" now has an effect analogous to a devise in similar terms: Law of Property Act, 1925, s. 130.

[3] Thus, if a gift "to A and his issue" speaks of A as their "parent," this usually showed that the gift was intended for A and his *children*: rule in *Sibley* v. *Perry* (1802), 7 Ves. 522. For the effect of a gift "to A and his children," see *post*, p. 190. But the word "*issue*" in its primary sense extends to *all* descendants: *Re Sutcliffe*, [1934] 1 Ch. 219.

Thus, in *Re Hammond* (1924),[1] a testator bequeathed all his *personal* estate to his widow for life, and after her death "equally between my two daughters . . . and their respective issue." It was decided (i) that each daughter and her issue took a moiety *in common* with the other daughter and her issue (note the words "between" and "respective"—words of severance); and (ii) that each moiety belonged to the daughter *concurrently with her issue* (including all living at the death of the widow—the period of distribution).[2]

In *Re Hayden* (1931),[3] however, a testator who died before 1926 devised *real property* to Charlotte for her life and afterwards "between her sisters or their issue." The Court decided (i) that "or" was here to be construed as "and," and (ii) that each sister therefore took an *entailed* interest *in common* with the others (note the word "between").

After 1925 the rule for personalty applies to realty also.

If, however, the testator *dies after* 1925, an informal expression such as "and his issue" can no longer create an entailed interest. As we have seen, section 130 (2) of the Law of Property Act, 1925, enacts that an informal expression which formerly conferred an entailed interest in real property when used in a will, now operates to give an interest corresponding to that which it conferred in a bequest of personalty. Hence, at the present day a devise or bequest "to A and his issue" gives A and his issue a joint interest in the property absolutely, unless the will shows an intention that they are to take in common with each other, or shows that A is to have a life interest, and that his issue are to take the property after he dies.[4]

To A and His Children

To A "and his children": (a) Personalty: *prima facie* a joint interest.

A bequest of *personal property* "to A *and his children*" is treated in the same way as a bequest "to A *and his issue*." Hence, A's children (born before the time of distribution) take jointly with him, unless the will shows that they are intended to take in common, or that they are to take in remainder after his death.[5]

---

[1] [1924] 2 Ch. 276.

[2] The Court did not decide whether each daughter took *jointly* with her issue or *in common* with them. But presumably they were jointly entitled amongst themselves, unless the words of severance could be construed as extending to this point as well as to (i).

[3] [1931] 2 Ch. 333.

[4] See also p. 188, note 3, *supra*.

[5] See Hawkins on *Wills* (3rd ed.), pp. 243–245, quoted with approval by Joyce, J., in *Re Jones*, [1910] 1 Ch. 167, 172.

(*b*) **Realty:** (i) **Before 1926: joint interest if children existed at date of will; otherwise an entailed interest.**

A devise of *real property* "to A *and his children*" was sometimes construed before 1926 as giving A an entailed interest. Nevertheless, the phrase "and his children"—unlike "and his issue"—is by no means an apt description of those who may inherit entailed property, unless, indeed, "children" is used in a secondary sense to include *all* the descendants of A. Accordingly, if A had any children *at the time when the testator made his will*, a devise "to A and his children" was construed as a devise to A and his children jointly.[1] But if A had no children at the time when the will was made, it was less likely that the testator intended to benefit the children individually; accordingly, the devise was then construed as a gift to A in tail. This distinction is usually known as the *Rule in Wild's Case*,[2] and like other rules of construction it was ousted if the will showed a contrary intention. Thus, even if A had children at the date of the will, there might be something in the will showing that an entailed interest was intended—i.e. that the words "and his children" were used merely as words of limitation.

(ii) Effect of Law of Property Act, 1925, s. 130, on devise of realty "to A and his children" after 1925.

Section 130 of the Law of Property Act, 1925, has altered that part of the *rule in Wild's Case*, which enabled the words "and his children" to create an entailed interest; for it enacts that after 1925 (1) informal expressions can no longer create an entailed interest, and (2) that such expressions as would have created an entailed interest before 1926 when employed in a will, but would not have been effectual for that purpose in a deed, are henceforth to be construed as though attached to a pre-1926 bequest of personalty.

Evidently, therefore, the section has affected neither the interpretation formerly placed upon bequests of personalty to A "and his children" nor that part of the *rule in Wild's Case* which governed these words if employed in a devise of *realty* in cases where A had children at the date of the will; for in neither case did the expression "and his children" operate before 1926 to create an entailed interest—indeed, the normal effect in both cases, as we have already seen, was to confer a joint absolute (or fee simple) interest upon A and his children. Where, however, *A has no children* at the date of the will, a devise of realty "to A and his children" formerly operated, as a rule, to confer an entailed interest upon him; in modern times, therefore, such a devise must, in these circumstances, be construed in the same fashion as was a bequest of personalty. Consequently, a devise or bequest "to A and his children" now confers a joint interest upon A and the children in every case, unless the will shows a contrary intention; for this was the normal effect both of a *bequest* in such terms before 1926, and of a *devise* if children existed when the will was made.[1] In every case, of course, the testator's entire interest in the property passes under the devise or bequest—unless a contrary intention is shown. Hence, if A and his children take jointly, they jointly take the fee simple or absolute interest if he was capable of giving it and showed no contrary intention.[2]

---

[1] Presumably all children living *when the testator dies* (and, if it is a postponed gift any more born before the period of distribution) are entitled in this case; for it is a class gift: *supra*, Ch. XII, *B*.

[2] (1599), 6 Rep. 16 *b*.

Semble is now in all cases the same as in a bequest of personalty.

To the Children of A

"To the children of A."

When property is given to "the children of A," this can hardly be intended to give an entailed interest, or, indeed, any other interest, to A; for the gift is obviously to his children only. They, therefore, take the property *jointly*, unless the will shows that they are intended to take *in common*; and they take as a class.

To B and the Children of A

"To B and the children of A":

Sometimes, however, a testator gives property to an artificial class, such as "*to B and the children of A*"; and here a further difficulty arises. Does the gift mean that B is intended to take one-half of the benefits from the property, and that the children of A take the other half between them? If so they are said to take *per stirpes* (i.e. as families). Or

B and the children take

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[1] Rivington, *Law of Property in Land*, p. 101, states that a distinction must still be drawn in devises of realty if A had no children when the will was made, and that A then takes a fee simple interest to the exclusion of his children; but this appears to conflict with the words of s. 130 (2). Goodeve and Potter, *Modern Law of Real Property*, p. 278, appears to hold the same opinion.

[2] See pp. 185–186, *supra*. Apparently, however, an evident *intention to give an entailed interest* without the use of proper technical words of limitation does not now prevent the testator's entire interest from passing under the gift. It did not do so in bequests of personalty before 1926—*Leventhorpe* v. *Ashbie* (1634) Roll. Abr. 831, pl. 1. Hence, it cannot do so now with either realty or personalty—Law of Property Act, 1925, s. 130 (2).

per capita, unless contrary intention.

does it mean that each child of A is to have an equal interest with B? If so they are said to take *per capita* (i.e. by heads). Apparently, if the gift is *joint* they are bound to take *per capita*, for a joint interest necessarily involves equality between all. Even, however, if the gift be *in common* (e.g. "equally *between* B and the children of A") the presumption is that they take *per capita*, if the gift is clearly intended as a class gift;[1] but, of course, they take *per stirpes* if the will shows that this was the intention.

To the Children of A and B

"To the children of A and B":

Means "to B and the children of A."

Most of the decisions on this topic concern gifts "*to the children of A and B.*" Here an additional doubt arises. Is B himself intended to benefit, or does the gift seek to benefit his children? In other words, is it equivalent to a gift for "B and the children of A," or should it be construed "to the children of A and *of* B"? The presumption in these cases is that the former meaning is intended; consequently, B (not his children) will take with A's children; and they take *per capita*, unless the will shows that they were intended to take *per stirpes*.

Thus, in *Re Cossentine* (1933),[2] a testator who had two sisters and a niece (the only child of his deceased brother) left the residue of his property "to be divided equally between the Local Preachers' Mutual Aid Society and *the heirs of my brother and sisters*." The Court, applying the general rule, construed this to confer one-quarter upon the Society, one-quarter for each of the two sisters, and one-quarter for the niece (i.e. the heir of the brother).[3]

Similarly, in *Re Harper* (1914),[4] a bequest "to be divided equally between the unmarried daughters of my brother-in-law Dr. H. and Dr. G. equally" was held to mean one-quarter for each of the three unmarried daughters of Dr. H., and the remaining quarter for Dr. G. (not for his daughter). Thus the distribution was *per capita*. Had it been *per stirpes* the three daughters of Dr. H. would have taken only one-half between them, and Dr. G. would have been entitled to the other half.[1]

---

[1] *Prima facie* it is not a class gift, since on the face of it B and the children of A do not appear to fall within a single description—*supra*, Ch. XII, *B*. But an evident intention to treat them as a class makes it a class gift.

[2] [1933] 1 Ch. 119.

[3] It was suggested here that "heirs" should be construed as "children" —as was sometimes done before 1926 if such was the testator's obvious intention (*supra*, pp. 142, 188. It made no difference here, however, so the point was not decided; for the niece was both the heir and the only child of the deceased brother.

[4] [1914] 1 Ch. 70.

Unless clearly intended for "the children of A and of B."

Moreover, if the context or surrounding circumstances show that a gift to "the children of A and B" was intended to benefit the children of A and *the children of* B, it will be so construed.

Thus, in *Re Dale* (1931),[2] a will directed that the proceeds of sale of certain property be divided "equally between the children of my son A *and my daughter B*." Luxmore, J., found that the will showed an intention to exclude the general rule, in that it evidently intended to benefit the children of the daughter and not the daughter personally. But there was no evidence of an intention to exclude the rule which presumes a division *per capita*; accordingly each child of A and each child of B (seven in all) took an equal one-seventh share of the property.

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[1] E.g. *Re Prosser*, [1929] W.N. 85; following *Re Walbran*, [1906] 1 Ch. 64. In both cases the decision that they took *per stirpes* rests on an evident intention to exclude the usual presumption that they were intended to take *per capita*—per Maugham, J., *Re Cossentine*, [1933] 1 Ch. 119, 123 (refusing to follow a dictum in *Re Walbran* that "between" suggests division into two parts only, and citing the *Oxford Dictionary* to justify this refusal).

[2] [1931] 1 Ch. 357.

INDEX

A

ABATEMENT—
  of legacies and devises, 72–76

ACCIDENT—
  may vitiate *animus testandi*, 56

ACCUMULATIONS OF INCOME—
  inalienability rule, 120 (n. 3), 134
  perpetuity rule, 134
  statutory rules and exceptions, 134–136

ACTION—
  choses in, 11
    donatio mortis causa of, 3 (n. 1)
  rights of, effect of death of party, 6 (and n. 6)

ADDITIONS, 37 (See ALTERATIONS; OBLITERATIONS)

ADEMPTION (See LEGACIES and DEVISES)

ADMINISTRATION—
  letters of, 8
    cum testamento annexo, 8
    revocation of grant of, 9
  (See ADMINISTRATORS)

ADMINISTRATORS, 6, 8
  history of, 21
  number of, 8
  (See ADMINISTRATION; PERSONAL REPRESENTATIVES)

ALLHUSEN *v.* WHITTELL, RULE IN, 83–84

ALTERATIONS, 39–40 (See ADDITIONS; OBLITERATIONS)

AMBIGUITIES—
  patent and latent, 149
  (See CONSTRUCTION, equivocation)

APPOINTMENT, POWERS OF, 14, 52–53, 102, 180
  exercise of, 33 (n. 1), 69–70, 174–176, 177
    by general gift, 174–177
    by pecuniary legacy, 175–176
    by specific gift, 174–175
    formalities for, 175 (n. 1)
  general, 14, 53
    devolution of property if exercised, 54
  gift over on default of appointment, 69–70, 168
  joint, 48
  lapse of appointment by will, 60 (n. 4)
  remote appointments, 130–132
  remote powers, 129
  special, 14, 53, 167–168
    exercise of, is outside Wills Act, 1837, s. 33, 61
    in nature of a trust, 168

APPROXIMATION, DOCTRINE OF, 118–119
  (See CY PRÈS DOCTRINE)

CONSTRUCTION (*contd.*)
  "survivors," 140, 166–167
  technical expressions, 141–146
  "to A and his children," 189–191
  "to A and his issue," 188–189
  "to B and the children of A," 191–192
  "to the children of A," 191
  "to the children of A and B," 192–193
  uncertainty, 138, 148, 149, 150–151, 154, 155
  (See CLASS GIFTS; EXTRINSIC EVIDENCE; WORDS)

CONTINGENT INTERESTS—
  can be devised or bequeathed, 51
  contingency, what is, 107–108
  (See CONDITIONS)

CONVERSION—
  actual, 93
  notional, 93–100
    by contract to sell, 94
    by court's order to sell, 94 (n. 1)
    by option to purchase, 95–96
    by statutory trust for sale, 97–98, 110 (n. 3)
    by trust for sale, 94–95, 96–98, 172 (n. 2)
    by trust to buy land, 99
    evasion of, 99–100
    excluded by contrary intention, 94, 95, 99
    failure of objects of, 98–99
    of partnership land, 94 (n. 1), 98 (n. 2)
    recent extension of, 95 (n. 3)
    reconversion, 100
  (See ADEMPTION)

CORPORATION SOLE, 54 (n. 3)

COURTS—
  Business of the Courts Committee, 7 (n. 5)
  Chancery, 12, 18, 20, 23, 85, 93, 100, 102
  Chancery Division of High Court, 7
  Common Law, 12, 20
  County, 7 (n. 4)
  Ecclesiastical, 16, 17, 19–20, 22, 23
  of construction, 7, 137, 154
  of probate, 7, 48 (n. 5), 137
  Probate, Divorce and Admiralty Division of High Court, 7, 23
  reconversion by, for infant or lunatic, 100 (n. 1)
  reorganisation of, 7, 20, 23, 85

COVENANT—
  that executors will transfer property, 2 (n. 2)

CREDITORS, 2 (and n. 1), 104–105
  priorities of, 6, 76–77

CROWN—
  bona vacantia, right to, 5, 28, 59
  land, absolute owner of, 11

CURTESY, 27 (and n. 3)

CY PRÈS DOCTRINE—
  as to entailed interests, 118–119, 128
    did not apply to personalty, 119
    semble now obsolete, 119
  as to gifts for charitable purposes, 151

DEATH—
- *commorientes*, 63
- duties, 1 (n. 2), 2, 3, 62, 63 (n. 4)
- presumptions as to, 63
- (See LAPSE; WILL)

DEED—
- gifts *inter vivos* by, 1
- settlements *inter vivos* by, 2 (and n. 3)
- signed, after 1925 must be, 36

DELIVERY—
- chattels, transfers of, 1
- *donationes mortis causa*, 3 (and n. 1)
- land, before 1926, 1 (n. 1)
- stamp duty evaded, 1 (n. 2)

DEVISE—
- what is, 4 (and n. 2)
- (See LEGACIES AND DEVISES)

DOMICIL, 30–33
- change of, 30 (n. 2), 31

DONATIONES MORTIS CAUSA—
- characteristics of, 3
- of choses in action, 3 (n. 1)

DOUBLE POSSIBILITIES—
- alleged general rule against, never existed, 117
- (See WHITBY *v.* MITCHELL, RULE IN)

DOWER, 27 (and n. 3)

E

EJUSDEM GENERIS DOCTRINE, 152–153

ELECTION, EQUITABLE DOCTRINE OF, 102–104
- compared with conditional gift, 103
- election against the will, 102–103
- limits of the doctrine, 103

ENTAILED INTERESTS, 13–14
- barring the entail, 13–14, 53 (n. 3), 113, 118 (n. 3)
- creation of, possible in personalty after 1925, 27, 181, 182 (n. 1)
  - impossible in personalty before 1926, 119, 184 (n. 2), 185, 188
  - words of limitation now necessary, 33 (n. 3), 181, 184
  - without words of limitation before 1926, 188–191
- *cy près* doctrine, 118–119
- devolution on death, 44 (n. 1), 54
- entailed property, tenant in tail could not formerly devise, 19
  - modern power to devise or bequeath, 53–54, 172 (n. 1), 180 (n. 4)
  - revocation of devise or bequest of, 66 (n. 4)
- implied, before 1926, 184–185
- infant, when deemed to have had, 55
- inheritance of, 26, 27
- kinds of, 26 (n. 4)
- lapse inapplicable if appropriate issue survive, 60–61
- perpetuity rule, 134 (and n. 1)

EQUITABLE DOCTRINES (See CONVERSION; ELECTION; SATISFACTION; TRUSTS, secret)

EQUITABLE INTERESTS—
- formerly protected only by Court of Chancery, 12
- general gift may include, 171
- kinds of, 12–14
- lien of unpaid vendor, 172 (n. 3)
- (See CONTINGENT INTERESTS; ENTAILED INTERESTS; FUTURE INTERESTS; LIFE INTERESTS; TRUSTS)

EQUITY—
- construes ineffectual assignment for value as contract to assign, 4 (n. 1)
- (See EQUITABLE DOCTRINES; EQUITABLE INTERESTS)

EQUIVOCATION (See CONSTRUCTION)

EXECUTION (See CODICILS; WILLS)

EXECUTORS—
- are nominated by will or codicil, 6, 43
- death of, 6 (n. 3), 8 (and n. 3), 44
- history of, 20–21
- legacy to, 59
- number of, 44
- preference by, 77 (n. 1)
- probate, 7, 8, 23, 44 (See PROBATE)
- property bequeathed to on trust, 59
- renunciation by, 7, 8, 44 (See PROBATE)
- undisposed of personalty, former right to, 59
- (See PERSONAL REPRESENTATIVES)

EXTRINSIC EVIDENCE—
- *animus testandi*, as to, 42
- construction, as to, usually inadmissible, 146
    - exceptions, 146–151
    - surrounding circumstances, 146–148, 158–160, 166–167, 179
    - testator's wishes, 148–150, 159, 160, 161
- double legacies, as to, 91 (and n. 1)
- lost will, as to, 68 (and n. 1)
- mortgaged property, as to, 76
- obliterations, as to, 41
- secret trusts, as to, 100–102

F

FEE SIMPLE—
- alienation of, 113 (and n. 6), 114, 119–121
- characteristics of, 11–12
- history of power to devise, 17–19
- intestacy, devolution on, 26–29
- (See REAL PROPERTY)

FELONS—
- can usually benefit under a will, 57

FEOFFMENT WITH LIVERY OF SEISIN, 1 (n. 1)

FOREIGNERS—
- wills of, 30–33

FRAUD—
- may vitiate *animus testandi*, 47, 56

FREEHOLDS (See REAL PROPERTY)

FUTURE INTERESTS—
are either vested or contingent, 108–109
can be devised or bequeathed, 51
contingent (See CONDITIONS; CONTINGENT INTERESTS)
general gift may include, 172
remainders, 13
equitable, 13, 117
legal, before 1926, 116–117
vesting of, 121–134
(See LEGACIES AND DEVISES)

G

GAVELKIND, CUSTOM OF—
allowed wills of freehold, 18
feoffment by infant under, 1 (n. 1)
primogeniture inapplicable to sons before 1926, 18 (n. 1)

GIFTS INTER VIVOS—
charactertics of, 1–3
early "wills" were, 15
revocation of, 3
wills distinguished from, 3–4

GUARDIANS—
appointed by will, 44
by informal wills, 34

H

HEIR—
former function in relation to executor, 21
former liability for specialty debts, 21
(See INHERITANCE)

HOMICIDE, 57

HOWE *v.* LORD DARTMOUTH, RULE IN, 87–90, 92

HUSBAND—
rights on death of wife intestate, 24–25, 27–29

I

INALIENABILITY, RULE AGAINST, 119–121
charitable trusts exceptional, 120, 133 (n. 2)
directions to accumulate income, 134 (n. 5)

INCAPACITY, 4, 51, 54–59
(See INFANTS; HOMICIDE; LUNATICS AND PERSONS OF UNSOUND MIND; MARRIED WOMEN)

INCOME (See ACCUMULATIONS OF INCOME; LEGACIES AND DEVISES)

INCORPORATION BY REFERENCE—
of documents, 45–46, 101
statutory will forms, 1925, 46
trusts involving entailed interests, 46 (n. 4), 182 (n. 1)

INFANTS, 55
appointment of guardians of, 34, 44
are likely to die intestate, 4
can benefit from will, 56

INFANTS (*contd.*)
- cannot disclaim property, 91 (n. 3)
- cannot make wills, unless soldiers or sailors, 34, 55
- domicil of, 30
- entailed interest, when deemed to have had, 55
- entailed property, cannot dispose of, 53, 55
- guardians of (See GUARDIANS)
- legal estate in land, cannot hold, 55
- maintenance out of income of legacy, 79–80, 109 (n. 1)
- pecuniary legacy to, when interest payable, 78–79
- reconversion for benefit of, 100 (n. 1)
- revocation by, 65 (and n. 2)
- soldiers and sailors, 34, 55
  - limits of power to devise land, 55
- witnessing wills, 38 (n. 4)

INHERITANCE—
- of entailed interest, 13, 26, 27
- of fee simple before 1926, 13 (n. 3), 26
- primogeniture, 18
  - inapplicable to females, 26
  - was inapplicable, in gavelkind, to sons, 18
- Royal Courts favoured, 17–18
- rules of, 26–27
  - when applicable after 1925, 27 (n. 1), 69, 143
- (See INTESTACY)

INHERITANCE (FAMILY PROVISION) BILL, 1934, 16 (n. 4)

INTER VIVOS DISPOSITIONS (See GIFTS INTER VIVOS)

INTEREST (See LEGACIES AND DEVISES)

INTESTACY, 4, 5, 10
- effect of notional conversion on, 98 (n. 3)
- hotchpot provision under modern rules, 28, 106
- *Howe* v. *Dartmouth* rule, now inapplicable, 92 (n. 1)
- partial, 4–5
- portion gifts, when deducted, 28, 106
- pre-1926 rules, when applicable to-day, 27 (n. 3), 69, 143, 145
- residuary gifts, lapsed, revoked, or void, devolve as on, 173–174
- rules, death after 1925, 27–29, 144
  - personalty, before 1926, 24–26, 142, 144
  - realty, before 1926, 26–27, 142
- surviving spouse, rights under former rules, 24–25, 27
  - rights under modern law, 27 (n. 3), 28–29
- trust for sale arises on, 97 (n. 1)
- (See INHERITANCE)

IRISH FREE STATE—
- Citizens Bill, 1934, 31 (n. 2)
- (Consequential Adaptation of Enactments) Order, 1923, . . . 31

L

LAND, 2, 3, 55
- (See LEASEHOLDS; REAL PROPERTY)

LAPSE, 59–64, 177 (n. 3)
- class gifts rarely lapse, 164, 165, 174
- exceptions to law of, 60–63
- gifts to be converted, 98–99
- residuary gifts, 64, 173–174
- specific gifts, 63, 172–173

LASSENCE *v.* TIERNEY, RULE IN, 155–157

LAW, RULES OF—
- compared with rules of construction, 138, 182, 185

LEASEHOLDS—
- are personal property, 10–11
- are wasting securities, 85, 86, 88
- form of will of, 31, 32–33
- *Howe* v. *Dartmouth* and, 88–89
- "lands," when included in gift of, 177–178
- "money," when included in gift of, 179–180
- "real" property, when included in gift of, 178
- (See PERSONAL PROPERTY)

LEGACIES AND DEVISES—
- abatement of, 72–76
- action against personal representatives for, 5
- ademption of, 72–76
  - conversion may cause, 93–98, 99–100
  - equitable doctrine of, 105–106
- advances of capital from legacies, 80–81
- annuities, 186
- beneficial, 182–183
- benefits from a property, of, 182, 183
- charitable purposes, for, 57, 133, 151 (See TRUSTS, charitable)
- class gifts, 174, 192 (n. 1) (See CLASS GIFTS; CONSTRUCTION)
- conditional, 102, 103
  - on claim by donee, 112
  - (See CONDITIONS)
- contingent, 78 (n. 3), 79, 107–111, 164 (n. 1)
  - advances out of, 80–81
  - income of, 79–80, 183
  - (See CONTINGENT INTERESTS; CONDITIONS)
- demonstrative legacies, 74
- determinable interests, 113 (See CONDITIONS, subsequent)
- disclaimer of, 91–92
- expected, assignments of, 4 (n. 1)
- expense incurred on, 79
- extent of donee's interest, 180–193
- freeholds, before 1838, 177 (n. 5) (See DEVISE)
- future, 78 (n. 3), 79
  - income from, 79–80, 183
- general, 72–75, 171
  - construction of, 171–177
  - effect of conversion, 96
- implication, by, 183–185
- income from, 79, 183
  - apportionment of, 81 *et seq.*
  - bonus shares, 82
- interest on, 78–79
- "land," 177–178
- lapsed, 59–64, 172–174 (See LAPSE)
- legacies, 4
  - charged on land, 78 (n. 5)
  - double, 90–91
  - future, advances out of, 80–81
  - in satisfaction of debt. 78 (n. 5), 104–105, 106 (n. 1)
- manuscripts, 182 (n. 3)
- maximum passes, 185–187, 191 (and n. 2)
- mortgaged property, of, 76
- next of kin, to, 143, 144–146

LEGACIES AND DEVISES (*contd.*)
- pecuniary legacies, 72, 104–105
  - general, 72, 183 (n. 1)
  - interest on, 78–79, 104 (n. 3)
  - to creditor, 78 (n. 5), 104–105
- priorities of, 6, 10, 72–76
- property comprised in, 170–180
  - producing income, 79
- residuary, 74–75
  - carry income from death, 83
  - conversion, effect of, 96
  - disclaimer of, 91–92
  - general, 171
  - include lapsed specific gifts, 63–64, 172
    - disclaimed specific gifts, 91
    - void specific gifts, 172–173
  - joint, 174
  - lapse of, 64
  - residue, how estimated, 83–84
  - residue of particular property, 173
  - revoked, 173–174
  - rule in *Lassence* v. *Tierney*, 156–157
  - settled, adjustments of income from, 83–90, 92
    - trust to convert, when implied, 89–90
  - void, 173–174
- sale by personal representatives, 96
- specific, 72–75
  - disclaimed, 91–92
  - lapsed, 63–64, 172
  - void, 172–173
- stock, bequest of, 72, 73–74, 175
- substitutional, to evade lapse, 60
- successive interests in, 81–90
- uncertain, 138, 148, 149, 150–151
- undivided shares, 187 (See CONCURRENT INTERESTS)
- vested, 108–109, 132–133
  - indefeasibly, 112
  - subject to be divested, 111–112, 132
- void, 172–174
- (See BEQUEST; CONSTRUCTION; DEVISE; LAPSE; REVIVAL; REVOCATION; WORDS)

LEX SITUS, 30–33

LIFE INTERESTS, 2, 12–13, 172
- annuities, 186
- creation of, by expressed intention, 186
  - by implication, 183
- *pur autre vie*, 51
- settled residue, in, 84–90, 92
- (See LEGACIES AND DEVISES, income from)

LONDON—
- former testamentary privileges of, 18, 22 (n. 5)

LUNATICS AND PERSONS OF UNSOUND MIND—
- *animus testandi* of, 46
- can benefit under a will, 56
- delusions, 56
- disclaimer, 91 (n. 3)
- homicide by, 57
- intestacy of, 4
  - pre-1926 rules may still apply, 27 (n. 3)

LUNATICS AND PERSONS OF UNSOUND MIND *(contd.)*
  lucid interval, 55–56
  reconversion, 100 (n. 1)
  sale by order of court, 76 (n. 1)
  witnessing wills, 38 (and n. 4)

M

MAINTENANCE (See INFANTS)

MARRIAGE—
  revocation of will by, 68–70

MARRIED WOMEN, 54–55
  disclaimer by, 91 (n. 3)
  domicil of, 30 (and n. 2), 31
  restraints upon anticipation, 92 (and n. 2), 103 (n. 3), 113–114
  signature, by what name, 36 (n. 2)
  widow, rights on intestacy, 24–25, 27–29
  (See WORDS, wife)

MAXIMS—
  actio personalis moritur cum persona, 6
  equity considers as done already that which ought to be done, 94, 97
  equity is equality, 87
  falsa demonstratio non nocet, 151–152

MISTAKE—
  may vitiate *animus testandi*, 47, 56

MORTGAGES AND CHARGES UPON PROPERTY—
  donee of property takes subject to, 76

N

NAME AND ARMS—
  condition that donee bear, 112

NAMES (See CONSTRUCTION)

NATIONAL DEBT—
  accumulations for reducing the, 134

NEXT OF KIN, 35
  (See INTESTACY; WORDS)

NORTHAMPTON, ASSIZE OF, 1176, 21

O

OBLITERATIONS, 40–41

OPTION TO PURCHASE (See CONVERSION, notional)

P

PARTNERSHIP PROPERTY (See CONVERSION, notional)

PECUNIARY LEGACIES (See LEGACIES AND DEVISES)

PEERAGE—
  condition that donee acquire, 110

PERPETUITIES, RULE AGAINST, 103, 111, 117 (n. 1), 118 (n. 1), 119 (n. 4), 121–134, 135, 136, 156
  appointments under powers, 129–132
  class gifts, 124–129

PERPETUITIES, RULE AGAINST (*contd.*)
  conditions, 111, 112
  contingent interests, 111, 132
  cy près doctrine, formerly evaded, 118 (n. 4)
  evasion of, 124–125
  exceptions to, 122–123, 132–134, 184 (n. 3)
  issue, failure of, 184 (n. 4), 185
  lives in being, 121, 123 (and n. 1), 124, 130, 131
  may defeat evident intention, 138
  period allowed, 121 (and n. 1)
  period of gestation, when added, 121 (n. 1), 122
  perpetuity, meanings of, 120–121
  powers, 129
  vested interests, 132–133

PERSONAL PROPERTY—
  absolute interests, alienation of, 113, 119–121
  bequest of, with words of limitation, 142–143, 188 (n. 2)
  conditions *in terrorem*, 114–115
  ecclesiastical courts, formerly governed wills of, 20
  "effects," bequest of, may pass all, 153
  entailed interests in, 181, 182 (n. 1)
    impossible before 1926, 119, 184 (n. 2), 185, 188
  form of wills of, 31–32
  history of wills of, 16–17
  "money," bequest of, may pass all, 179–180
  personal representatives, devolves upon, 6
  (See LEASEHOLDS)

PERSONAL REPRESENTATIVES, 5–7, 22
  actions by and against, 5, 6 (and n. 6)
  advertisements, protection by, 78
  are now "real" representatives also, 22
  assent by, 24 (and n. 1), 44, 77 (and n. 5)
  bequest to, 143–144
  debts of deceased, extent of their liability, 76–77, 78
  debts incurred by, 77
  duties of, 5–7, 76–90
  "executor's year," 78, 81, 83, 84, 85–86, 88 (n. 1), 89 (n. 3), 90 (n. 1), 104 (n. 3)
  expense incurred by, 77, 79
  history of, 20–24
  lease, liability on covenants of, 77 (n. 3)
  number of, 6 (and n. 5)
  powers of, 76–81, 81–90
    advancing capital, 80–81
    appropriation, 77
    of trustees for sale, 77 (n. 4)
    maintenance, 79–80
  property devolving upon, 5–7, 43–44, 44 (n. 1), 51–52, 54
  remuneration of, 77 (n. 2)
  revocation of authority, 9
  sale by, 77
  settled property, rules for adjusting income of, 81–90
    trust to convert, when implied, 87–90
  special, for purposes of settled land, 52 (n. 2)
  trust property, 13 (n. 2), 52
  undisposed of property, implied trust for sale, 27
  (See ADMINISTRATORS; EXECUTORS)

PERSONS—
  en ventre, 121 (n. 1), 123 (and n. 1), 135
  preparing or obtaining a will, 58–59
  unsound mind, of (See LUNATICS AND PERSONS OF UNSOUND MIND)

- PORTIONS—
  - ademption of legacies by, 105–106
  - intestacy, 106
  - satisfaction of portion debts by, 106 (n. 1)
- POWERS OF APPOINTMENT (See APPOINTMENT, POWERS OF)
- PRIMOGENITURE, 18
  - entailed interests, still applicable to, 27
  - personalty, inapplicable to before 1926, 25
  - real property, applicable to before 1926, 26
  - (See INHERITANCE)
- PROBATE, 7–8, 39
  - courts of, 7, 48 (n. 5), 137
  - history of, 22–24
  - in blank, 41
  - instruments partly testamentary, 42
  - irrelevant passages, 50
  - real property, wills of, 23
  - renunciation of, 7
  - revocation of grant, 8 (n. 1), 9
  - (See EXECUTOR)
- PROPERTY—
  - classification of interests in, 10–14
  - moveable and immoveable, 10, 30–33
  - (See PERSONAL PROPERTY; REAL PROPERTY)

R

- REAL PROPERTY—
  - conditions *in terrorem* are valid, 114
  - devise of, before Act of 1837, 19, 20, 177 (and n. 5)
  - history of wills of, 17–20
  - "money," gift of, may include (*semble*), 179–180
  - personal representatives, devolves upon, 6–7
  - (See INTESTACY rules.)
- RE-CONVERSION, 99
  - (See CONVERSION)
- REMAINDERS (See FUTURE INTERESTS)
- REMOTENESS, RULES AGAINST, 116–136, 181 (n. 1)
  - (See ACCUMULATIONS; INALIENABILITY; PERPETUITIES; SEISIN; WHITBY *v.* MITCHELL)
- RESIDUARY GIFTS (See LEGACIES AND DEVISES, residuary)
- RESTRAINTS UPON ANTICIPATION (See MARRIED WOMEN)
- REVIVAL OF REVOKED DISPOSITIONS, 70
  - *animus revocandi* conditional upon, 71
- REVOCATION, 65–71
  - *animus revocandi*, 67–68
    - imperfect, 70–71
  - by destruction, 41 (n. 2), 67
  - by marriage, 48 (n. 6), 65 (n. 2), 68–70
  - by obliteration, 40–41, 41 (n. 2)
  - by subsequent will or codicil, 65–67, 155
  - conditional, 70–71
  - dependent relative, 41, 71
  - *donatio mortis causa*, of, 3

REVOCATION (*contd.*)
  express, 65–66
  gift *inter vivos*, of, 3
  implied, 66
  mutual wills, of, 48–49
  undertakings not to revoke, 43, 48–49

S

SAILORS (See SOLDIERS AND SAILORS)

SALE—
  ademption of legacy or devise by, 72, 73, 75
  contract of, conversion results, 94
    creates equitable interest, 172
  personal representatives, by, 77
  trust for (See TRUSTS, trusts for sale)

SATISFACTION, 104–106
  of debts by legacies, 104–105
  of portion-debts by legacies, 106 (n. 1)

SEISIN, ABEYANCE OF THE—
  rule against (now obsolete), 116–117

SETTLEMENTS OF PROPERTY—
  inter vivos, 2, 52 (n. 2)
  will, by, 81–90

SHELLEY'S CASE, RULE IN, 142 (n. 2), 188 (n. 1)

SOLDIERS AND SAILORS—
  can make informal wills, 17, 19, 33–35
  infant, 34
    limits of power to devise land, 55
  revocation by, 65, 66
  service of Crown, in, 34
  witnesses to wills of, 33, 58

SPOUSES—
  are not, as such, "of kin," 144 (n. 4), 145 (n. 4)
  (See HUSBAND; MARRIED WOMEN)

STATUTORY WILL FORMS, 1925, 46, 84

TENURE, 11–12

TEXTBOOKS, ETC., REFERRED TO—
  Cambridge Law Journal, 89
  Cheshire's *Modern Law of Real Property*, 10
  Coke upon *Littleton*, 154
  Dicey, *Conflict of Laws*, 30, 137
  Goodeve, *Personal Property*, 10
  Goodeve and Potter, *Modern Law of Real Property*, 10, 134, 191
  Hawkins on *Wills*, vii, 91, 139, 179, 189
  Hayes and Jarman, *Forms of Wills*, vii
  Holdsworth, *History of English Law*, 15, 20, 22, 74. 137
  Jarman on *Wills*, vii, 56, 139
  Keeton, *Law of Trusts*, 2, 57, 77, 80, 82, 90, 91, 92, 102, 120, 133, 151, 168
  Law Quarterly Review, 82, 102, 142, 182
  Oxford Dictionary, 193
  Pollock and Maitland, *History of English Law*, 15, 16, 20, 22, 43

TEXTBOOKS, ETC., REFERRED TO (*contd.*)
- Rivington, *Law of Property in Land*, 10, 191
- Snell's *Equity*, 3, 77, 92, 93, 94, 104, 106, 114
- Theobald on *Wills*, vii, 56, 113, 139
- Underhill and Strahan on *Wills and Settlements*, 139
- Whitelock, *Anglo-Saxon Wills*, 15
- Wigram on *Extrinsic Evidence*, 146, 150
- Williams on *Executors*, vii
- Williams on *Personal Property*, 10
- Williams on *Real Property*, 10
- Wolstenholme and Cherry's *Conveyancing Statutes*, 89

TRUSTS, 12–14
- created by wills, 182
  - executor, when bound by, 44 (n. 5)
- charitable, 57
  - *cy près* doctrine as to, 151
  - inalienability rule inapplicable to, 120
  - perpetuity rule, 133–134
- imposed on absolute gift, 100–102, 155–157, 182
- non-charitable purpose, 57, 120
- secret, 46 (n. 1), 100–102, 182 (n. 4)
- trustees, 2, 12–14, 81
  - are usually joint tenants, 12
  - cannot devise or bequeath trust property, 52
  - death of, 12, 52, 171 (n. 3)
  - duties of, 12, 80, 85–90
  - powers of, 79–81
  - settled devise or bequest, of, 81 *et seq.*
- trust property, devolution of, 12, 52, 171 (n. 3)
  - settled land, on death of tenant for life, 52 (n. 2)
  - trustee securities, 85 (n. 1)
- trusts for sale, 46 (n. 3)
  - ademption by, 96–98
  - capital advances from property held on, 80 (n. 2)
  - express, of settled residue, 85–87
  - implied, of settled residue, 87–89
  - notional conversion effected by, 32 (n. 1), 94–95, 110 (n. 3), 172 (n. 2)
  - power to postpone sale, 86, 88, 97
  - statutory, 97–98, 110 (n. 3)
- undertakings not to revoke may create, 48–49

U

UNDUE INFLUENCE—
- may vitiate *animus testandi*, 56, 58–59

USES, 15

W

WHITBY *v.* MITCHELL, RULE IN, 117–119, 128, 129
- abolition of, 118
- evaded by *cy près* doctrine, 118–119
- required a preceding life interest, 128, 129

WIFE (See MARRIED WOMEN)

WILD'S CASE, RULE IN, 190–191

WILL, 1–5
- ambulatory nature of, 3–4, 15, 19, 42–43, 108, 137
- Anglo-Saxon, 15, 20–21

WILL (*contd.*)
- *animus testandi*, 42, 46–47
  - conditional, 47
  - (See ACCIDENT; COERCION; FRAUD; INCAPACITY; MISTAKE)
- confirmation of, 53, 69, 94–95
- date of death, descriptions of property, 170–171, 176–177
  - identity of class, 125–126, 163–164, 190
  - presumptions as to, 63
  - will operates at, 42, 122
- date of making, identity of individual donee, 158, 161–162
  - *Wild's case*, 190, 191
- dependents disinherited by, 16
- execution of, 30–41, 137
  - signature of testator formerly unnecessary, 17, 19
  - (See WITNESSES)
- guardians appointed by, 34, 44
- hereditative nature of, 43–44
- history of, 15–20
- holograph, 17, 36 (n. 7)
- incorporation of documents, 45–46, 101, 182 (n. 1)
- informal, 17, 19, 33–35
- joint, 47–48
- joint mutual, 49
- lost, 68
- mutual, 48–49
- nuncupative, 17, 33
- pages of, 39
- period of distribution, 126–128, 164, 166
- property disposable by, 51–52
- republication of, 162 (n. 2), 171
- revocation of, 15, 19, 43, 137 (See REVOCATION)
- (See CODICIL; CONSTRUCTION; PERSONAL REPRESENTATIVES; PROBATE; WORDS)

WITNESSES—
- attestation clause, 39
- death of 8 (n. 1)
- gift to, or to spouse, 58, 66
- incapacity of, 38 (and n. 4)
- must attest operative signature, 39
- number of, 17, 19, 37, 58
- signatures of, 38–39
- superfluous, 58
- to testator's signature, 37–39
- to wills before 1838, 17, 19, 38 (n. 5)

WORDS—
- "all my property," 170
- "between," 187, 192, 193 (and n. 1)
- "chattels," 153 (n. 2), 179 (n. 2)
- "children," 189–191
- "descendants," 181
- "die without issue," 184, 185
- "effects," 153 (and n. 3), 179 (n. 2)
- "eldest son," 162
- "equally," 187
- "goods," 153 (n. 2), 179 (n. 2)
- "grandchildren," 162
- "have no issue," 184, 185
- "heirs" (or "heir"), 141–143, 181, 188, 192
- "heirs (or heir) of the body," 141–143
- "in common," 187

WORDS (*contd.*)
  "income," 182 (n. 2)
  "issue," 163, 188 (n. 3), 188–189
  "lands," 177–178
  "legal representatives," 143–144
  "money," 178–180
  "mother," 140
  "my piano," 171
  "my present lease," 171
  "nephew," 141, 162
  "next of kin," 25, 144–146
  "niece," 147–148, 163
  "or," 189
  "others," 167 (n. 3)
  "personal representatives," 143–144
  "real estate," 178
  "real property," 178
  "rents and profits," 182
  "representatives," 143–144
  "seed," 181
  "shares," 187
  "Statutes of Distribution," 25 (and n. 1), 26 (and n. 1), 144, 145
  "statutory next of kin," 25
  "survivors," 140, 166–167
  "War Loan," 147, 152
  "wife," 69, 140, 161–162, 163
  "will," 45
  (See CONSTRUCTION)

WORDS OF LIMITATION, 17
  absolute and fee simple interests, 185–186
  entailed interests, 26 (and n. 4), 33 (n. 3), 181, 184, 186, 188–191
  gifts without, construction of, 185–186
  personalty, before 1926, 142–143, 188 (n. 2)

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